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No. _____

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IN THE

Supreme Court of the United States

October Term, 1989

CENTRAL VERMONT RAILWAY, INC.,
Petitioner,

vs.

STATE OF VERMONT and
CITY OF BURLINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT.

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Do the actions of the State of Vermont, in "inferring" without basis, a condition subsequent into nineteenth century state land grants, thereby diminishing the nature of Petitioner's estate in filled lakeshore lands, constitute a taking of property interests requiring just compensation?

2. Did the Vermont Supreme Court interpret away federally protected property rights by failing to rest its interpretation of nineteenth century state land grants on a fair, substantial, and reasonable interpretation of state law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Central Vermont Railway, Inc., the defendant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the Vermont Supreme Court, which modified and affirmed the decision of the Vermont Superior Court, Chittenden County. The Vermont Supreme Court's decision inferred a condition subsequent into an 1827 statute that granted to littoral owners adjoining Lake Champlain fee simple absolute title to lands created by the building of wharves into the lake.

Opinions Below

The opinion of the Vermont Supreme Court is not yet reported and is set forth in the Appendix (1a-20a). The opinion of the Superior Court (trial court) is unpublished and is set forth in the Appendix (21a-46a).

Jurisdiction

The judgment of the Vermont Supreme Court was entered on December 22, 1989 (1a). The jurisdiction of this Court to review the judgment of the Vermont Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. §1257.

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V:

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law;

State of Vermont, General Assembly, Acts of 1827, no. 38:

> Complete text with revision history set forth in the Appendix at 47a-48a.

State of Vermont, General Assembly, Acts of 1874, no. 85:

> Complete text with revision history set forth in the Appendix at 49a-50a.

Statement of the Case

A. Procedural History and Nature of the Case

This suit concerns a taking, by the State of Vermont, of a portion of Petitioner's estate in filled lands on the waterfront of Lake Champlain in the City of Burlington.

In the decision below the State of Vermont transforms, *ipse dixit*, a "fee simple absolute title" in land into a "fee simple subject to a condition subsequent," with the beneficiary of the newly created right of re-entry being the State of Vermont itself.

The lands in question were created by Petitioner, Central Vermont Railway, Inc. ("CVR") and its predecessors-in-title under authority of the Vermont Acts of 1827, no. 38 ("1827 Act"), by filling the lakebed along the shoreline of Lake Champlain for wharves and storehouses. The railroad's title was granted by the Act and later confirmed by the Vermont Acts of 1874, no. 85. On the basis of these statutes and their interpretations by the courts. CVR's fee simple absolute title was unquestioned for one hundred forty years.

The State of Vermont and the City of Burlington challenged CVR's title in these lands by filing suit for ejectment and declaratory judgment in October, 1984. The suit sought to assert reversionary title interests in the filled lands. Alternatively, the suit sought recognition of an implied covenant that the filled lands be used for only public purposes. The State and City argued below, on the basis of the common law public trust doctrine, that if the Vermont Legislature had made an unconditional grant of the lands, it was not competent to do so. The Vermont Supreme Court expressly disavowed any reliance on the competency rationale, however, and instead rested its decision solely on an interpretation of the 1827 Act. (11a)

The case was initially heard by bench trial in Vermont Superior Court, Chittenden County, in January 1987, Judge Martin presiding. In its Findings of Facts and Conclusions of Law (25a-46a), the Superior Court found that CVR had created the filled lands during the time that the 1827 Act was in effect, that the filling complied with the express conditions and limitations of the Act, and that the filled lands did not impair navigation. The Court further found that the filled lands created by CVR fulfilled the public purpose intent of the Legislature in promoting commerce and trade and that the *quid pro quo* of the Act was the granting of fee simple title to the lakebed beneath the filled lands. The Court further found that CVR had paid taxes on the filled lands and that the State and City have repeatedly recognized the railroad's title to the filled lands. The Court also found that the current public access to Lake Champlain in Burlington is extensive.

On the basis of these findings, the Superior Court concluded that "CVR holds the filled lands at issue in this action in fee simple impressed with the public trust doctrine. This means that the railroad is free to convey such lands . . . so long as such land is used for a public purpose." (46a) Relying on *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892), the Superior Court concluded that the Legislature was competent to convey away these lands, but that nonetheless they must be used for a public purpose.

In its decision, the Superior Court listed specific cases (from other states) as examples of appropriate public uses that are encompassed by the contemporary public trust doctrine: Coast Guard facilities, YMCAs, restaurants, bars, hotels, pools, shopping complexes, golf driving ranges, airports, stadiums and public exhibitions. (43a-45a)

In a post-judgment motion, CVR requested the Superior Court to clarify whether offices and residential uses would be included as appropriate public uses. The court declined to decide the issue but retained jurisdiction to resolve any dispute whether a proposed use of the filled lands complies with the public trust condition imposed by the Judgment Order.

CVR appealed the Judgment Order of the Superior Court to the Vermont Supreme Court. The State and City subsequently cross-appealed. The State argued, *inter alia*, that it possessed a right of re-entry in the filled lands for breach of a condition subsequent that the lands be used for railroad, storage, or wharfing purposes only. None of the parties to the appeal challenged the Superior Court's Findings of Fact.

The Vermont Supreme Court, holding that "ordinary rules of property law" do not apply, acceded to the State's arguments, and candidly "inferred" a condition subsequent into the 1827 Act. Thus, the Vermont court's unique "interpretation" of the nineteenth century land grants has created for the benefit of the State of Vermont a newly created right of re-entry in the filled lands. This new right was taken from Petitioner's fee simple absolute estate, without paying just compensation.

Pursuant to Sup. Ct. R. 14.1(h), Petitioner states that it has argued in both courts below that the State's assertion of a right of re-entry in CVR's lands would constitute a taking, requiring the payment of just compensation. In the Vermont Supreme Court, the issue was specifically raised in CVR's opening brief, its reply brief, and at oral argument. *E.g.*, Appellee's (CVR's) Brief at 22; Appellee's (CVR's) Reply Brief at 3, 5, 14-15,

17, 19, 22-23. Petitioner's position is that the Vermont Supreme Court interpreted away its property rights to avert a taking and avoid the requirement of just compensation.

B. Statement of Facts.

In the period 1815 to 1840, Vermont was undergoing economic hard times. The State wished to encourage commerce and trade but could not expend any funds to do so. The 1823 opening of the Champlain Canal, connecting Lake Champlain with the Hudson Valley, provided Vermont an opportunity to expand its markets for agricultural and manufactured products. The development of a port at Burlington was important to encourage the desired commerce and trade. The first step in the port development was the construction in 1827 of a "breakwater" in Burlington harbor. The next step was to encourage the construction of wharves and piers from the shallow shore out into Lake Champlain.

Since in Vermont the boundary of littoral lands is "low water" (*i.e.*, the littoral landowner owns the uplands and the shore and the State owns the submerged lands below low water), the construction of these structures necessitated the use of the State's submerged lands. Unlike many states, however, there was no common law right in Vermont to "wharf out" to reach navigable waters, and therefore numerous individual grants were made by the Vermont Legislature during this time authorizing the construction of wharves, docks and piers into Lake Champlain on the State's submerged lands.

As an encouragement to commerce and trade, in 1827 Vermont enacted a general statute authorizing the erection of wharves and storehouses into Lake Champlain. Acts of 1827, no. 88. (47a-48a) This general

statute provided that anyone who owned land along Lake Champlain could erect wharves into the lake from their land so long as such wharves did not interfere with navigation. "Wharves" were understood to be permanent structures requiring appropriation of the lakebed. The statute went on to provide that when lakefront owners erected such wharves, they and "their heirs and assigns shall have the exclusive privilege of the use, benefit and control [thereof] forever."

In 1849, a predecessor-in-title of Petitioner CVR acquired a strip of land along the shore in Burlington and immediately began the construction of wharves by filling in the lakebed. During the 1860s another of CVR's predecessors-in-title acquired additional lands from which it filled into the lake. Later, in 1888, CVR's predecessor-in-title also purchased a parcel of land which third parties had previously filled.

It is undisputed that the filled lands created by CVR and its predecessors complied with the express limitations and conditions of the 1827 Act: These wharves or filled lands were located between CVR's littoral property and the channel of the lake and did not impede navigation.

Further, it is undisputed that the filled lands created by CVR or its predecessors fulfilled the intent of the Legislature by promoting commerce and trade and, in fact, resulted in a great economic benefit to the State. In the late 1840s to early 1860s, CVR predecessor railroads constructed lines and depots on their lands on the Burlington waterfront, including on the filled lands. The railroads provided both passenger and freight services, which resulted in tremendous growth of manufacturing, shipping and tourism in Burlington. The railroad was particularly beneficial to the lumber industry, and by

time. As a result of this ordinance, along with other economic factors, there has been a reduction in railroad and industrial activity on the waterfront. (33a)

Given the decline in railroad and industrial use of its property and the required phasing-out of the formerly permitted uses by the City, CVR actively pursued the sale of its lands for development in accordance with the commercial and retail uses premitted under the new zoning ordinance. (35a-36a)

Until late 1985, the City strongly and actively encouraged the development of its waterfront, including CVR's filled lands, for such commercial, office and residential uses. The City supported development efforts through attempting to obtain Federal grants and to obtain bond financing for infrastructure improvements. After that time however, the political makeup of State and City changed; despite this 140 year history of uninterrupted ownership, use, benefit, and control of these lands, and despite the consistent recognition of CVR's and its predecessors' title to the filled lands, Respondents have challenged CVR's title to the filled lands and attempted to acquire these lands without paying just compensation. In fact, the State is now seeking to exercise its newly-created right of re-entry, arguing that the diminished usage of the land for wharfing, railroad, and storage purposes, which its own policies and those of the City—including restrictive zoning—helped to create, has resulted in a breach of the newly-created condition subsequent.

ARGUMENT

The statute that granted the title of submerged lands to CVR did so using language that clearly and unambiguously conveyed fee simple absolute title. No one questioned that fact for some one hundred forty years.

The Vermont Supreme Court has now, *ipse dixit*, declared a change in the nature of that ownership interest, converting without compensation a fee simple absolute title to fee simple subject to a condition subsequent. The result is an instantaneous diminution of the railroad's estate in the filled lands by judicial fiat.

This newly-interpreted condition subsequent suddenly and drastically limits the allowable uses of the property, thus diminishing its value dramatically. But this case is not about a mere restriction on the use of land; rather, if CVR uses the filled land for other than railroad, wharfing, or storage purposes, it does so at peril of losing all title to the land. The nature of CVR's title itself has been changed by creating a right of re-entry for the benefit of the State of Vermont, and thus a potential complete forfeiture of title to the property. All of this has been done without any basis in Vermont law or in the language of the granting statute, and without affording Petitioner just compensation.

CVR's property rights are federally protected by the Just Compensation Clause of the Fifth Amendment to the United States Constitution, which is applicable to the State of Vermont through the Fourteenth Amendment. *See United States ex rel. TVA v. Pomelson*, 319 U.S. 266, 279 (1949). This Court has jurisdiction to review state court decisions to ensure that federally protected rights are not evaded or "interpreted away." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

There is ample reason to be suspicious of the Vermont court's treatment of this federal issue. The Vermont Supreme Court admittedly "inferred" a condition subsequent in favor of the State of Vermont itself. Most importantly, the Vermont Supreme Court's interpretation of the grants is wholly irrational: it finds no substantial basis in Vermont law, or for that matter, in the law of any other state. The court below recognized the unprecedented nature of its decision; it stated that this case "transcends the ordinary rules of property law." (17a) The court candidly admitted that it was "inferring" a condition subsequent into the 1827 grants.

Given the State of Vermont's and the City of Burlington's avowed interest in eliminating the railroad related and industrial uses on the filled land, and in obtaining this valuable waterfront property for a public park, the Vermont court's "interpretation" of the original grants is certainly convenient for the State; to a federal system premised on supremacy of the guarantees of the United States Constitution, however, this "interpretation" can only be termed highly irregular.

I. Reversionary Interests Cannot, Without Basis, Be "Inferred" After-The-Fact in State Land Grants Without Affording Just Compensation.

> "Was it ever imagined that land voluntarily granted to any person by the State was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but, in a country like ours, where thousands of land titles had their origin in gratuitous grants of the states, it would go far to shake the foundations of the best settled estates."
>
> *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 684 (1819) (Story, J.)

The after-the-fact redefinition of Petitioner's property rights by the Vermont Supreme Court constitutes an uncompensated and therefore unconstitutional taking. A state cannot impose (or "infer") reversionary interests in its own favor onto previously granted property rights without basis and without paying just compensation. This is not regulation, but outright appropriation of title by the state. It is axiomatic that such government appropriation requires just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. *E.g., Nollan v. California Costal Comm'n*, 483 U.S. 825, 831-832 (1987). Every court that has addressed this issue has determined that a state's taking of a reversionary interest constitutes a compensable taking. *E.g., Glosemeyer v. Missouri-Kansas-Texas Ry.* 879 F.2d 316, 321-24 (8th Cir. 1989); *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 704 (D.C. Cir. 1988); *Lawson v. State*, 107 Wash. 2d 444, 730 P.2d 1308, 1315-16 (1986).

This Court's recent decision in *Preseault v. Interstate Commerce Comm'n*, No. 88-1076 (Feb. 21, 1990) [58 U.S.L.W. 4493], confirms the same rule, ensuring that a Tucker Act remedy would be available in cases where "rail-to-trail" conversions amounted to a taking of privately held reversionary interests. Slip Op. at 10-12. Justice O'Connor's concurring opinion in *Preseault* makes clear that government usurpation of reversionary interests constitutes a taking. *See id.* at 4-6 (O'Connor, J., concurring, joined by Scalia and Kennedy, JJ.):

> [Government] may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power.

Id.. at 4 (O'Connor, J., concurring).

Well-established principles of "taking" analysis mandate this result. Indeed, this Court has recognized that government appropriation of even lesser servitudes may also impose the requirement of just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("even if the government physically invades only an easement in property, it must nonetheless pay just compensation"); *United States v. Lansby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). The Court recently concluded that even a temporary burdening of property, short of a permanent taking, may nevertheless mandate compensation by the state or municipality. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 804, 818-19 (1987). In this case, the state is taking a substantial legal estate in CVR's property: a right to re-enter and regain the property if it is not used for railroad, wharfing or storage purposes. Of course, the new condition subsequent has a substantial—and devastating—effect on the current use and value of CVR's property. In addition, by seeking to enforce its newly "interpreted" right of re-entry, the State seeks to divest Petitioner of all its right and title in the filled lakeshore lands and take them over as its own.[1]

This Court has jurisdiction to review state court decisions to ensure that federally protected rights are not evaded or "interpreted away." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944);

[1] Shortly after the Vermont Supreme Court's decision in this case, the State of Vermont intervened in a pending action in Superior Court seeking to enforce its right of re-entry in most of the filled land currently owned by CVR. *Central Vermont Railway, Inc. v. City of Burlington*, no. 5850-87-CnC. CVR is seeking a stay of that matter pending outcome of this Petition. Since the only issue in the pending state actions is whether this newly-created condition subsequent has been breached, the constitutional issue must be decided here.

Fox River Co., v. Railroad Comm'n, 274 U.S. 651 (1927). A state court cannot avoid a taking by simply declaring that there are no rights to be taken. As this Court has unanimously recognized: "a state, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

In this case, under the guise of "interpreting" the 1827 Vermont grants, the court below has done just that: Without any fair or substantial basis in state law, the Vermont court has given the State of Vermont a right of re-entry in Petitioner's lands that it did not heretofore possess; as such, it has taken Petitioner's valuable property rights.

II. The Vermont Supreme Court's Implication of Reversionary Interests in favor of the State of Vermont has no Fair, Substantial or Reasonable Basis in State Law and Constitutes an Evasion of Federal Protection.

Property rights, of course, are not generally created by the Constitution; they are defined in the first instance by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 84 (1980). Nonetheless, a state court's interpretation is not the last word for the purpose of federal constitutional analysis. *Webb's Fabulous Pharmacies*, 449 U.S. 155; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348 (1922); *see also* 16 C. Wright & A. Miller, *et al.*, *Federal Practice and Procedure* §4030 (1977 and Supp. 1989).

When the 1827 Act is understood under a well-settled, contemporaneous view of state property law, its meaning is clear; Petitioner was granted a fee simple absolute interest in the lands at issue in this case. This

interpretation is consistent with all the parties' reliance, actions, and understanding for over 140 years, and is consistent with general, universal understandings of real property law. Notwithstanding the Vermont court's current ruling, CVR had "more than a unilateral expectation" of its property rights; rather, it has "a legitimate claim of entitlement" to its title to the filled lands. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

A. The 1827 Act Created Fee Simple Absolute Title.

That the language of the 1827 state grants created fee simple rights cannot be seriously questioned. Responding to numerous individual applications for grants, the Vermont Legislature became increasingly pressed to issue grants for construction of wharfs on Lake Champlain. *See* 7 *Records of the Governor and Council of State of Vermont* (E. Walton ed., Montpelier, 1873). The 1827 Act was a general statute passed by the Vermont Legislature granting the right to:

> [E]ach and every person owning lands adjoining Lake Champlain . . . to erect any wharf or wharves, storehouse or storehouses, and to extend the same from the land of the person or persons, so erecting, in a direct course, into Lake Champlain, to any distance they may choose within the State.
>
> *Provided*, such wharf . . . shall be located between the lands of the person or persons, so erecting, and the channel of the lake.
>
> *Provided* also, that such wharf . . . shall not be extended so far into said lake as to impede the ordinary navigation in passing up and down said lake, as heretofore accustomed.
>
> . . . .

> [E]*ach and every person or persons, their heirs or assigns, shall have the exclusive privilege of the use, benefit and control of any wharf* or wharves, storehouse or storehouses, *forever*, which may hereafter be erected in said lake, agreeably to the provision of this Act.

1827 Act (emphasis added). (47a)

The language of the 1827 Act is the language of a "grant." *Cf. Franklin County Grammar School v. Bailey*, 62 Vt. 467, 20 A. 820 (1889) (grant of school lands). In the only contemporaneous Vermont cases interpreting the 1827 Act, both courts describe the 1827 Act as a "grant." *Austin v. Rutland Railroad Co.*, 45 Vt. 215, 243 (1873) ("*Austin I*"); *Austin v. Rutland Railroad Co.*, 17 F. 466, 470 (D.Vt. 1883) ("*Austin II*"). In *Austin II*, the court held that the grant was a conveyance of all rights the state had in the lakebed:

> The act of the state legislature in passing the statute giving the riparian proprietors the right to build and own docks or wharves, (Rev. Laws, §§1919, 1920 [Act of 1827]) was a *grant* of such rights in the direction [in the lake] as the state had, and after that the riparian owners were vested with the full right to make such erections in the waters of the lake and own them.

Austin II, 17 F. at 470. (Emphasis added.)

Moreover, "wharves" are understood to be permanent structures that require appropriation of the bed of the lake and therefore the grant of the right to build wharves was a grant of lakebed beneath such wharves. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214-15 (1969) ("it has been settled law that structures, such as wharves and piers, permanently affixed to land are extensions of the land"); *Port of Portland v. Reeder*, 203 Or. 369, 280 P.2d 324, 332 (1954) ('Wharves' within the

statute authorizing riparian owners to construct wharves refers to "substantial and permanent structures built out from the land and forming an extension thereof").[2]

The grant of the 1827 Act is to owners of lands adjoining the Lake who erected wharves agreeable to the statutory provisions and "their heirs or assigns . . . forever."

It is beyond question that a grant to "a person, his heirs and assigns," creates a fee simple absolute title. The key words are "his heirs". *Restatement (First) of Property* §27. This rule has been followed in Vermont from the earliest times. *Beach v. Haynes*, 12 Vt. 15, 20 (1840); *Blake v. Stone*, 27 Vt. 475, 476 (1855); *Smith v. Hastings*, 29 Vt. 240 (1857); *Congregational Society of Halifax v. Stark*, 34 Vt. 243, 250 (1861); *cf. Thompson v. Carl*, 51 Vt. 408 (1878) (words "*and* her heirs" creates an estate tail, not fee simple); *Johnson v. Barden*, 86 Vt. 19, 22, 83 A. 721 (1912) (use of word "heirs" without pronoun found to convey life estate). At the time of the 1827 Act, the fact that a fee simple title was passed by the language used in the grant was widely known and accepted. *See* John Simmons, *The Gentlemen's Law Magazine* (Middlebury, Vt., 1804); Thomas G. Fessenden, *The American Clerk's Companion and Attorney's Prompter* (Brattleborough, Vt., 1815); Asa Aikens, *Aikens' Practical Forms*, (Middlebury, Vt., 1st ed. 1823 & 2d ed. 1836.

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[2] In *Austin I*, 45 Vt. at 242-43, the Vermont Supreme Court remarked on a peculiarity of Vermont common law: "[T]here is no *common law* of Vermont by which the owner of land bounded on Lake Champlain, has a right beyond low water to appropriate as his own the bed of the lake." However, the right may be "conferred by act of legislation." The court went on to reference several private wharf acts and the 1827 Act as legislative conferral of the right to construct wharves, docks, etc. The language of the *Austin I* case is clear that the legislative grant of a right to construct a wharf meant "a right beyond low water to appropriate as his own the bed of the lake." *Id.*

The word "forever" is not necessary to create a fee simple, but is indicative of the intent to create a fee simple absolute estate. *Robinson v. Missisquoi R.R. Co.*, 59 Vt. 426, 432, 10 A. 522 (1887); *Johnson v. Barden*, 86 Vt. 19, 22, 83 A. 721 (1912); *University of Vermont and State Agr. College v. Ward*, 104 Vt. 239, 245, 159 A. 773 (1932).

The *habendum* clause in the most common nineteenth century "form deed" granting fee simple absolute title coupled the phrase "his heirs and assign" with the phrase "to his and their use and behoof forever." *See, e.g.*, Form #67, *Aikens' Practical Forms*, *supra*. "Behoof" means "use, benefit, profit, service or advantage." *Black's Law Dictionary* 141 (5th ed. 1979). Grants, deeds or bequests of land to another's "use, benefit and control" or similar language have universally and consistently been interpreted as indicating a transfer of fee simple absolute title. *See, e.g., Holmes v. Holmes*, 65 Wash. 2d 230, 396 P.2d 633 (1964); *Burcham v. Burcham*, 219 N.C. 357, 13 S.E.2d 615 (1941); *Merrill v. Am. Baptist Missionary Union*, 73 N.H. 414, 62 A. 647 (1905).

The granting clause of the 1827 Act uses both "their heirs or assigns" and "use, benefit and control . . . forever." Given the wide-spread and unquestioned acceptance of these terms as indicating a grant in fee simple absolute, the Vermont Court's contrary ruling here cannot be accepted for the purposes of avoiding the requirement of just compensation.

B. The 1827 Act was Unconditional Except as to the Location of the Wharves

There are—despite the Vermont Supreme Court's "inference"—no conditions in the statutory grant requiring that the filled land be used only for "railroad, wharf, or storage purposes" (20a), and there is clearly no reservation of any reversionary interest or right of re-entry in favor of the state. It is elementary black-letter property law that conditions subsequent are not lightly inferred and that rights of re-entry must be explicitly stated in the deed or grant to be effective. This rule is specifically made applicable to state land grants in Vermont by statute. In an attempt to avoid the Fifth Amendment's requirement of just compensation, Vermont has stood property law on its head.

The Vermont court has attempted to justify its ruling—which it admits "transcends the ordinary rules of property law"—by relying on current theories and understandings of the public trust doctrine. This approach is legally and logically flawed; rather, the grants at issue here must be judged and interpreted under a view of the law contemporaneous with the grant.[3] A review of state law contemporaneous with the grants confirms the irregularity of the Vermont court's approach.

Indeed, "inferred" conditions subsequent simply do not exist in contemporaneous Vermont property law. The Vermont Supreme Court has on several occasions given specific instructions regarding the manner in which conditions subsequent must be created. In *Palmer's Exr.*

[3] A state cannot give and then later take away without also running afoul of the Contract Clause of the United States Constitution. U.S. Const., Art. I, §10; *See Burlington Firefighter's Ass'n v. City of Burlington*, 149 Vt. 293, 543 A.2d 686 (1988).

v. Ryan, 63 Vt. 227, 22 A. 574 (1891), for example, the Court was presented with a deed which contained a clause providing that the grantee would erect and maintain a fenceline on the property. When the grantee failed to erect and maintain a fenceline, the executor of the estate of the grantor sought the return of the land, arguing that a condition subsequent has been created by the deed and breached by the grantee's failure to perform. The Court rejected the executor's arguments. The Court began its discussion by citing the time-honored adage that "the law does not favor forfeitures." *Id.* at 229. Before reviewing the deed, the Court wrote:

> No particular form of words is necessary to create a condition, yet it is essential that some words shall be used which *ex vi termini* express an intention to create an estate dependant upon the performance of some duty or the happening of some contingency provided for.

Id. at 229-30.

The Court admonished that "conditions and limitations *are not to be raised by mere inference* and argument," *Id.* at 230 (emphasis added), and went on to find that the language of the deed requiring the erection of a fence was not a condition which would result in forfeiture, but was rather merely a covenant, the breach of which could give rise to an action for damages: "There is nothing in the deed which suggests that the parties thereto intended or understood that a failure to comply with this clause should work a forfeiture of the land." *Id.* Thus, the Court was explicit that a condition subsequent cannot be read into a deed; there must be express language from which it is clear that the parties mutually intended to create a condition, and mutually intended that breach of the condition would result in forfeiture.

In a case decided shortly after *Ryan*, the Court again suggested that the *instrument itself* must manifest the parties' intention to create a condition: "[T]he intention of the parties is to be gathered from the whole instrument." *Shum v. Claghorn*, 69 Vt. 45, 48, 37 A. 236 (1896).

Nearly fifty years later, in *Queen City Park Assoc. v. Gale*, 110 Vt. 110, 3 A.2d 529 (1938), the Court once again warned that it would not find a condition subsequent unless the grant contained clear language suggesting that a condition was intended. Citing a Massachusetts case, *Ayer v. Emery*, 96 Mass. (14 Allen) 67, the Court wrote: "It is perfectly well settled that an estate on condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation." 110 Vt. at 116. The Court also quoted the *Restatement (First) of Property:*

> "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land (a) creates an estate in fee simple; and (b) *provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created.*"

Id. at 115 (quoting *Restatement (First) of Property* §45) (emphasis added).

The Court again explained that clear conditional language was required because "conditions subsequent are not favored in law" and because "the law is adverse to forfeitures." 110 Vt. at 116. The court cited *Kilpatrick v. Mayor*, 81 Md. 179, 31 A. 805, 806 (1895), which in turn cited *Stanley v. Colt*, 72 U.S. (5 Wall.) 119, 163-68 (1866), indicative of the universal nature of the rule. In the *Queen City* case, the Court also noted that "the absence of a clause for re-entry may signify that no condition was intended." 110 Vt. at 116.

In this case, it cannot be seriously argued that the 1827 grants contain clear conditional language. The opposite is true. The only express or clearly implied conditions of the statutes were: "provided, such wharf or wharves be located between the lands of the person or persons, so erecting, and the channel of the lake" and "provided also, that such wharf or wharves, storehouse and storehouses shall not. . .impede navigation." (47a) Neither of these conditions are at issue in this case and no allegation has been made that the defendants or their predecessors-in-title have violated these conditions. Moreover, there is no right of re-entry specified in the grant. It is axiomatic that without an explicit right of re-entry even clearly conditional language will be construed as merely precatory or as creating a covenant.

C. By Vermont Statute, Conditions in State Grants Must be Express or Clearly Implied

In Vermont, the common law rule regarding conditions in grants has been codified statutorily with regard to State land grants. The current statute provides that a grant may be forfeited only "for the non-performance of a condition annexed to or contained in such grant, whether expressed, or from the nature of the grant, clearly implied." 12 V.S.A. § 4983. This statute traces its origin to before the time of the 1827 Act, *see* Laws of the State of Vermont, Revised and Passed by the Legislature, Ch. 49, §§ 1-7 (1797) ("1797 Laws"), but in 1827 the statute provided for forfeiture of grants only in cases of "non-performance of conditions annexed to or contained in any grant or grants." (1797 Laws, §1). The "clearly implied" language in the current version of the statute was not added until 1839. *See* Revised Statutes of Vermont, Ch. 39, §3 (1839).

Thus, the forfeiture of grant statute, from its first enactment in 1797, served as an instruction to the Vermont Legislature that if it wanted to impose conditions on state land grants it could do so, but it had to do so expressly. The Legislature knew how to impose conditions when it desired; the 1827 Act itself contains several express conditions regarding the location of wharves—which are not at issue here. At that time, the legislature knew it had to impose conditions expressly, but failed to do so in the 1827 Act. The Vermont Supreme Court cannot constitutionally impose them now—after one hundred forty years of unquestioned title—without affording just compensation.

D. Title was Confirmed by the 1874 Act

Even if CVR's title to the filled lands under the 1827 Act could be questioned, the railroad's title was statutorily confirmed by a railroad-specific statute in 1874:

> *An Act to Confirm the Title to Certain Structures in Lake Champlain*
>
> It is hereby enacted by the General Assembly of the State of Vermont:
>
> Sec.1. Whenever *any railroad company* in this state shall have constructed their railroad beyond low water mark into Lake Champlain, or *shall have built out into said lake any wharf, dock, pier, or other structure* in connection with such railroad, for its accommodation or use, which shall not impede ordinary navigation in passing up and down said lake, *such building and structures are hereby declared to be lawful, and the legal title thereto is hereby confirmed to such railroad companies respectively, which built the same or other lawfully claiming through them.*

1874 Act (emphasis added). (49a)

The 1874 Act appears to be a response to a Vermont Supreme Court case handed down in 1872. In that case, the court had implied that the Rutland Railroad (not a predecessor of CVR) had not complied with the conditions of the 1827 Act regarding the location of its wharves, and that therefore the proper littoral owners might be able to maintain a nuisance action against the railroad. *Austin I*, 45 Vt. at 244. The 1874 Act was a legislative response aimed to cure the particular Rutland Railroad situation in the *Austin I* case. However, the language of the statute is not limited in any such manner. The statute equally confirms "legal title" to the lands built out into Lake Champlain by others, including CVR's predecessors-in-title. Given the plain meaning of the words of the grant there is no need for statutory construction. *Kennedy v. Rutter*, 110 Vt. 332, 6 A.2d 17 (1939). However, in the event statutory construction is necessary, based on the historical context, any examination of legislative intent of the Act would reveal the intent to remove questions about title to filled lands of *any* railroads on the Burlington waterfront.

Nor may the State of Vermont bootstrap a condition subsequent out of contemporary understandings of the public trust doctrine. The court below cites no authority even vaguely contemporaneous with the legislative enactments at issue here that would in any way imply or suggest that public trust considerations alone could mandate the suspension of the ordinary rules of property law or could require that explicit statutory language be

ignored.[4] There is no such authority; the only contemporaneous constructions of these legislative grants interpret them for what they are: grants of filled lands in fee simple absolute to the littoral owners. *Austin I*, 45 Vt. at 243; *Austin II*, 17 F. at 470. Indeed, in an 1851 case addressing the very lands involved in this suit, the Chittenden County Court specifically rejected an argument that these lands could be used only for wharfing and storage purposes.[5] The current Vermont Supreme Court's unique "interpretation" must be seen for what it is—an uncompensated and therefore unconstitutional taking.

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[4] The Vermont Court's reliance on *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 393 N.E.2d 356 (1979), is at best misguided. The Massachusetts court held that lands filled below low water pursuant to local statutes are subject to an implied condition that the filled lands be used for "public purposes." Unlike the Vermont statutes, however, the Massachusetts statutes never purported to be a *grant* of lands, *see id.*, 393 N.E.2d at 361-62, and no language of conveyance or inheritance is contained in those statutes, 393 N.E.2d at 364.

[5] *Stacy v. Vermont Central Ry*, (Cty. Ct. 1851). The *Stacy* case was an appeal of an appraisal of damages for the condemnation by CVR's predecessors of some of the lands involved in this suit. The court found "the claimant had the right to wharf out into the lake so as not to obstruct navigation and to use such wharf for *other than wharfing and storage purposes*". On the basis of this holding regarding the unlimited title to filled lands after exercising the wharfing rights under the 1827 Act, the court increased the condemnation award by 313%!

CONCLUSION

The opinion below goes against hundreds of years of black letter property law in order to interpret away Petitioner's rights and avert a taking. This Court should review the highly irregular decision of the Vermont Supreme Court so as to ensure the supremacy of federal law and protect Petitioner's valuable property rights. The Petitioner respectfully request this petition be GRANTED.

Respectfully submitted,

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APPENDIX

**Decision of the Vermont Supreme Court,
Dated December 22, 1989.**

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 43 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decision, Vermont Supreme Court 111 State Street, Montpelier, Vermont 15632 of any errors in order that corrections may be made before this opinion goes to press.

VT. SUPREME COURT
Filed in Clerk's Office
DEC 22, 1989

No. 87-697

Supreme Court

On Appeal from Chittenden Superior Court

November Term, 1988

State of Vermont and
City of Burlington

v.

Central Vermont Railway, Inc.

Stephen B. Martin, J.

Jeffrey L. Amestcy, Attorney General, and J. Wallace Malley, Jr., Assistant Attorney General, Montpelier, for plaintiff-appellant State of Vermont.

John L. Franco, Jr., Assistant City Attorney, Burlington, for plaintiff-appellant City of Burlington.

Fred I. Parker, Liam L. Murphy and Neal D. Ferenc, Law Clerk (On the Brief), of Langrock, Sperry, Parker & Wool, Burlington, for defendant-appellee.

Stephen Dycus and Richard O. Brooks, Professors, and Peter Anthony and Barbara Grabowski, Law Students, South Royalton, for amicus curiae Environmental Law Center.

PRESENT: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), Springer, D.J. (Ret.), and Costello, D.J. (Ret.) (Specially Assigned).

PECK, J. At issue in this case is title to a 1.1 mile strip of filled lands lying along the City of Burlington's waterfront. In response to recent efforts by Central Vermont Railway (CVR) to sell this property to a real estate developer, the City and the State challenged CVR's title in the Chittenden Superior Court, invoking the public trust doctrine. The court concluded that CVR has fee simple title to the parcel at issue but held that the land must always be used for a public purpose. CVR appeals, and the State and the City cross-appeal. We modify the trial court's order and, as modified, affirm.

In 1827, legislation was enacted that granted litteral owners on Lake Champlain the right to erect wharves by adding fill to submerged lands along the lakeshore.[1] 1827, No. 38. The 1827 Act provided that persons complying with the statute would have, with their heirs and assigns, the exclusive privilege of the use, benefit, and control of the wharves forever. The purpose of this legislation was to increase commerce and trade without an expenditure of public funds.

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[1] The word "wharf" is defined to include structures built with fill along a shoreline so that boats can be brought alongside them to load and unload cargo and passengers. See *Port of Portland v. Reeder*, 203 Or. 383, 384-85, 280 P.2d 324, 332 (1955).

In 1849, the Vermont Central Railroad, a predecessor of CVR, used condemnation proceedings to obtain a strip of land along the lakeshore and began filling a substantial area lakeward from this strip. By 1851, this area had been used to bring a railroad line to the waterfornt. Filling operation, first by Vermont Central and later by CVR, continued until 1972. CVR also purchased contiguous lands that had been filled by others. The railroad has paid property taxes on certain portions of the lands and has sold other portions to the City and the federal government.

By the late 1970s, CVR's use of the area at issue had declined significantly. At the time of trial, the railroad had only one active customer on the waterfront.

CVR has pursued three major plans over the last decade for selling and/or developing its land along the lake, which now consists of the previously mentioned 1.1 mile strip centrally located on the City's waterfront. The first two of these plans failed to materialize, but, on December 10, 1986, the railroad entered into a purchase and sale agreement in which it agreed to sell or lease a large portion of the filled lands to a real estate developer.

The City and the State petitioned the Chittenden Superior Court for a declaratory judgment, challenging CVR's title on public trust grounds. After trial, the superior court concluded that CVR "holds the filled lands . . . in fee simple impressed with the public trust doctrine. This means that the railraod is free to convey such lands to any party, and these parties to any other parties, so long as such land is used for a public purpose." The court retained jurisdiction to resolve any dispute as to whether a proposed use of the property complies with the public purpose condition.

CVR brought the instant appeal, claiming that the trial court erred in concluding that its title is held subject to public trust limitations. CVR also argues that plaintiffs' claims are barred by estoppel and laches. The City and the State cross-appealed, urging: (1) that the trial court erred in holding that CVR has a fee simple interest in the filled lands; (2) that, even if CVR has such an interest, it is a fee simple determinable; (3) that, in any event, the legislature may revoke CVR's interest in the filled lands; (4) that only the State can act as public trustee; and (5) that allowing a private corporation to determine the uses of public trust property represents an unlawful delegation of legislative authority.

I.

Under the public trust doctrine, the lands submerged beneath navigable waters are "held by the people in their character as sovereign in trust for public uses for which they are adapted." *Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918). Title to these lands is deemed to be "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). The character of this title is distinctive as compared to state-held title in other lands, *id.*, and different legal rules therefore apply. *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 631, 393 N.E.2d 356, 358 (1979).

The public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law. *Id.* As one court has observed:

> For centuries, land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics. Historically, no developed western civilization has recognized absolute rights of private ownership in such land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor the English common law as it developed after the signing of the Magna Charta would permit it.

United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122-23. (D. Mass. 1981) (citations omitted). After the American Revolution, the people of each state acquired the "absolute right to all . . . navigable waters and the soils under them for their own common use . . . ." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

Despite its antediluvian nature, however, the public trust doctrine retains an undiminished vitality. The doctrine is not " 'fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit.' " *Matthews v. Bay Head Improvement Ass'n.*, 95 N.J. 306, 326, 471 A.2d 355, 365 (1984). (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972)). The very purposes of the public trust have "evolved in tandem with the changing public perception of the values and uses of waterways." *National Audubon Society*, 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 356. Nor is the doctrine fixed in its form among jurisdictions, as "there is no universal and uniform law upon the subject." *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

II.

In Vermont, the critical importance of public trust concerns is reflected both in case law and in the state Constitution. Chapter II, Section 67 of the Vermont Constitution provides that:

> *The inhabitants of this State shall have liberty* in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner *to fish in all boatable and other waters* (not private property) under proper regulations, to be made and provided by the General Assembly.

(Emphasis added.)[2] Although Section 67 has no direct application here, it underscores the early emphasis placed upon the public interest in Vermont's navigable waters.

In 1918, this Court considered a miller's claimed right to raise and lower the level of lake Morey by a few inches, an activity that the miller and his predecessors had been carrying out for one hundred and twenty years. See *Hazen*, 92 Vt. at 416-17, 105 A. at 250. The miller accomplished these manipulations by altering a dam constructed by the state with legislative authority. After concluding that the waters of Lake Morey were boatable as a matter of law, the Court stated:

> Being public waters according to the test afforded by the Constitution, the grants of land bounding upon the lake pass title only to the water's edge, or to low-water mark if there be a definite low-water line. The bed or soil of such boatable lakes in this State is held by the people in their character as sovereign in trust for public uses for which they are

[2] In *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 35 A. 323 (1895), this Court held that the parenthtical phrase "not private property" modifies "other waters" and not "boatable" waters. *Id.* at 344-45, 35 A. at 325.

> adapted. The (miller) did not, therefore, acquire any title to the waters of the lake, as such, nor to the lands covered by such waters, by grants from private sources. And the General Assembly cannot grant to private persons for private purposes, the right to control the height of the water of the lake . . . for such a grant would not be consistent with the exercise of that trust which requires the State to preserve such waters for the common and public use of all. The General Assembly being powerless to make such a grant, none can be intended as the basis of the decree.

Id. at 419-20, 105 A. at 251 (citations omitted). Thus, while *Hazen* involved a claim of right to manipulate water levels rather than a claim of title, the case stands for the proposition that the legislature cannot grant rights in public trust property for private purposes. In several other cases, this Court has invoked the public trust doctrine in rejecting claims of private rights with respect to public waters. See *In re Estalishment of Water Levels of Lake Seymour*, 117 Vt. 367, 375, 91 A.2d 813, 818 (1952). (no right to control water level of lake can be acquired by or granted to private persons for private purposes); *State v. Malmquist*, 114 Vt. 96, 106, 40 A.2d 534, 540 (1944) (same); and *State v. Quattropan*, 99 Vt. 366, 366, 133 A. 352, 355 (1926) (doctrine bars litteral owner's claim of right to boat on public reservoir).

III.

It is against this legal and historical backdrop that we must judge CVR's assertion of title to the waterfront area at issue. The primary grounds for the railroad's claim lie in the provisions of two nineteenth-century legislative acts. The first, enacted in 1827, provides, in pertinent part:

> That each and every person owning lands adjoining lake Champlain, within this state, be . . . fully authorised and empowered to erect any wharf or wharves, store-house or store-houses, and to extend the same . . . into lake Champlain, to any distance they may choose within this state.
>
> . . .
>
> *Provided also*, That such wharf or wharves, store-house or store-houses shall not be extended so far into said lake as to impede the ordinary navigation in passing up and down said lake. . . .
>
> . . .
>
> That each and every person or persons, their heirs or assigns, shall have the exclusive privilege of the use, benefit and control of any wharf or wharves, store-house or store-houses, forever, which may hereafter be erected in said lake, agreeably to the provisions of this act.

1827, No. 38, §§1, 3.

The railroad also cites the provisions of legislation enacted in 1874, which provides:

> Whenever any railroad company in this state shall have constructed their railraod beyond low water mark into Lake Champlain, or shall have built out into said lake any wharf, dock, pier or other structure in connection with such railraod, for its accommodation or use, which shall not impede ordinary navigation in passing up and down said lake, such building and structures are hereby declared to be lawful, and the legal title thereto is hereby confirmed to such railroad companies respectively, which built the same, or others lawfully claiming through them.

1874, No. 85, §1. Contending that the 1874 Act is unequivocal as to ownership of the filled lands, CVR maintains that the trial court erred in holding that the railroad's title remains impressed with the public trust. We disagree.

We begin by observing that the public trust doctrine, particularly as it has developed in Vermont, raises significant doubts regarding legislative power to grant title to the lakebed free of the trust.[3] As the Supreme Court of California has stated:

> [T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. . . . The corollary rule which evolved in tideland and lakeshore cases bar[s] conveyance of rights free of the trust except to serve trust purposes . . . . [P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.

National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 425-26, 437, 658 P.2d 709, 712, 721, 189 Cal. Rptr. 346, 349, 358 (1983) (en banc). This rule obtains because the state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power. See *id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358. In the landmark case of *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), the United States Supreme Court declared:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as

[3] The grant at issue here does not directly violate the rule enunciated in *Hazen* and our other cases because the grant was made for public, not private, purposes.

> to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable with its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

Id. at 453-54.

Citing dicta in *Illinois Central*, CVR argues that there are limited exceptions to the rule against alienation of trust property. *Illinois Central* involved a legislative grant to a railroad company, purportedly transferring title to the entire lakebed underlying the city of Chicago's harbor. The Court held that the grant was void on delegation grounds, observing that:

> The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.

Id. at 460.[4]

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[4] If CVR's interpretation of the wharfing statutes here were adopted by this Court, then the 1827 legislature would have delegated, beyond the power of all subsequent legislatures, control of over a mile of submerged lands lying along the shore of central Burlington Harbor.

In a preliminary discussion of the public trust doctrine, the Court noted the existence in "the adjudged cases" of two exceptions to the general rule against legislative alienation of trust property: grants of submerged parcels for purposes of aiding commerce or promoting the public interest and "grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining . . . ." *Id.* at 452-53. The first of these exceptions—which have never been espoused by this Court—does not provide guidance in situations where a grantee later seeks to abandon the public purpose for which the grant was made. CVR urges that the second exception establishes that grants of public trust property can sometimes be made totally free of the trust; the State, on the other hand, argues that an unqualified grant of the lands at issue here would substantially impair the public interest in the lands and waters remaining.[5]

We need not resolve this fundamental question of legislative power, however, because we hold that the legislature did not intend to grant the lands at issue free from the public trust. "[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily

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[5] These exceptions have not been widely discussed in modern cases. In *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980), however, the Supreme Court of California opined that the meaning of the second exception is not clear, noting that the *Illinois Central* court "may have had in mind either former navigable waters which had been filled and were thus no longer useful for navigation, or shoals and swamp lands." *Id.* at 522 n.6, 606 P.2d at 365 n.6, 162 Cal. Rptr. at 330 n.6, 162 Cal. Rptr. at 330 n.6. Under the California approach, grantees may acquire unrestricted rights in trust property only in rare instances. See, e.g., *National Audubon Society*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation." *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 528, 606 P.2d 362, 369, 162 Cal. Rptr. 327, 334, *cert. denied*, 449 U.S. 840 (1980). As this Court observed in *Hazen*, "general words used in a statute will not apply to a state to the detriment of sovereign rights or interests unless such an intent clearly appears from the language used ...." *Hazen*, 92 Vt. at 420, 105 A. at 251.[6]

First, we note that neither the 1827 Act nor the 1874 Act contains a clear expression of an intent to abandon the public trust interest in the lands covered by the wharves. The earlier statute gave litteral owners the right to create the wharves, and it granted "the exclusive privilege of the use, benefit and control" of those wharves to the persons who created them and "their heirs or assigns ... forever." CVR contends that the words "heirs and assigns ... forever" evince a legislative intent to grant a fee simple absolute in the lands now at issue. But these words do not refer to the

[6] CVR argues that general rules of construction are inapplicable here because 12 V.S.A. §4983 establishes specific grounds for forfeiture of a state grant. Section 4983 provides that "[g]rants may be adjudged forfeited for the nonperformance of a condition annexed to or contained in such grant, whether expressed, or from the nature of the grant, clearly implied." But we are not determining here whether CVR has forfeited its grant; instead, we are determining the nature and extent of that grant.

submerged lands, or even to ownership of the wharves themselves; instead, they refer only to the privilege of using and controlling the wharves.[7]

The 1874 Act comes no closer than the 1827 Act to an expression of legislative intent to abandon the public trust. To the extent that the language of the Act provides any guidance on this question, it implies that the legislature meant to ensure *preservation* of the trust: the Act confirms only "legal title" in the railroads, and this term is common parlance in the law of trusts. See *Noyes v. Noyes*, 110 Vt. 511, 520, 9 A.2d 123, 128 (1939); *City of St. Albans v. Avery*, 95 Vt. 249, 253-54, 114 A. 31, 33 (1921). The use of the term here suggests, if anything, legislative acknowledgement that beneficial title to the lands at issue was vested in the public.

Moreover, the historical context of the 1874 enactment is significant. In 1872, this Court considered a case in which a railroad company had filled submerged lands in Lake Champlain along shoreline that it did not own. See *Austin v. Rutland Railroad Co.*, 45 Vt. 215 (1873). While the railroad's rights to the filled lands were not directly at issue, the Court implied that the true litteral owner might have a legal remedy against the railroad. *Id.* at 244. Thus, it appears that the subsequent 1874 Act was intended to address this specific conflict between private parties rather than any question involving the public trust. Cf. *Boston Waterfront*, 378 Mass. at 649, 393

[7] CVR cites cases from other jurisdictions in support of the proposition that fee simple absolute title passed to the railraoed's predecessors immediatly upon their filling of the submerged lands in accordance with the statutory provisions. If this were true, however, then the litteral owners would have been free to use their wharves for private purposes as soon as they were created, and such a construction of the Act would frustrate the manifest legislative intent.

N.E.2d at 367 (distinguishing between the allocation of property rights among private individuals and situations involving public trust resources).

Nor do we find that an intention to abandon the public trust is necessarily implicit in either of the Acts before us. The 1827 Act can be read as a simple grant of wharfing rights and privileges, while the 1874 Act actually employs the language of trust law. Neither of these enactments is inconsistent with a continuing adherence to public trust responsibilities on the part of the legislature.

The Supreme Judicial Court of Massachusetts was recently confronted with a strikingly similar factual situation. See *Boston Waterfront*, 378 Mass. at 630-37, 393 N.E.2d at 357-61. There, a series of early nineteenth-century wharfing statutes had granted a wharf company the right to construct wharves into Boston Harbor and to hold them in fee simple. In recent years, a development corporation obtained the rights to these wharves and sought to register and confirm title to the lands beneath them. After an exhaustive review of the public trust doctrine, the court held that the development corporation had title to the property in fee simple, "but subject to the condition subsequent that it be used for the public purpose for which it was granted." *Id.* at 649, 393 N.E.2d at 367. In discussing the legislative intent underlying the wharfing statutes, the court observed that:

> At that time, it was probably inconceivable to the men who sat in the Legislature . . . that the harbor would ever cease to be much used for commercial shipping, or that a wharf might be more profitable as a foundation for private condominiums and pleasure boats than as a facility serving public needs of commerce and trade. They did not speculate on

> what should become of the land granted to private proprietors to further development of maritime commerce if that very commerce should cease, because they did not envision it.

Id. at 648, 393 N.E.2d at 366. It is unlikely that the drafters of Vermont's 1827 Act were any more farsighted than Massachusetts' nineteenth-century legislators in this regard. With respect to the subsequent 1874 Act, which related to wharfs built for railroads, it seems equally improbable that the lawmakers of that era could have imagined that the newly-laid rails would ever fall into disuse.

We are bound to interpret these enactments, if reasonably possible, to preserve the public's rights in the trust property. See *City of Berkeley*, 26 Cal. 3d at 528, 606 P.2d at 369, 162 Cal. Rptr. at 334. Therefore, we conclude that the legislature did not intend, through the provisions of either Act, to grant a fee simple absolute in the lands at issue.

IV.

The exact nature of CVR's interest in the filled lands must still be determined. The State argues that the railroad's predecessors were granted only a franchise or an easement in the lands and that the grant was for an indefinite period of time. In support of this contention, the State cites *State v. Forehand*, 312 S.E.2d 247, 249 (N.C. App. 1984), in which the court held that a grant of submerged lands for wharf purposes "merely conveyed an appurtenant easement to erect wharves to the riparian owner."

Given the language of the two Acts here, however, a similar interpretation cannot be sustained. First, the 1827 Act expressly states that the subject rights were granted "forever." While this word does not render the

grant unconditional, it surely makes its duration something more than indefinite. Second, although the 1874 Act's confirmation of "legal title" to the filled lands would not necessarily be inconsistent with the grant of a franchise or an easement, it appears to connote some greater right.

Nor does this Court's obligation to construe the Acts to preserve the public trust mean that we are required to characterize them as grants of easements or franchises. As we have already observed, after considering the similar grants at issue in *Boston Waterfront, the Supreme Judicial Court of Massachusetts concluded that they were intended by that state's legislature to convey fee simple title, but subject to the condition subsequent that the property be used for the public purpose for which it was granted.* *Boston Waterfront,* 378 Mass. at 649, 393 N.E.2d at 367. We believe that such an interpretation here gives full effect to the words of the legislature while ensuring that its underlying intent to preserve the public trust is uncompromised.

Accordingly, we hold that CVR has a fee simple in the filled lands subject to the condition subsequent that the lands be used for railroad, wharf, or storage purposes. This means that the State has the right of re-entry in the event that the condition is breached by the railroad.[8] See *Collette v. Charlotte,* 114 Vt. 357, 360, 45 A.2d 203, 205 (1946).

CVR notes that, under 12 V.S.A. §4983, a condition must be clearly implied by the nature of the grant it qualifies in order to support forfeiture for non-

[8] The State and City appear to argue that the condition subsequent has already been breached through CVR's declining use of the filled lands. On the basis of the record before us, we decline to so hold.

performance of that condition.[9] As the foregoing discussion suggests, we conclude that a condition subsequent regarding use of the property is clearly implied by the nature and the subject matter of the two Acts. Although conditions subsequent are not favored in the law, *Queen City Park Ass'n v. Gale*, 110 Vt. 110, 116, 3 A.2d 529, 531 (1938), the public's sui generis interest in trust property "transcends the ordinary rules of property law." *Boston Waterfront*, 378 Mass. at 650, 393 N.E.2d at 367. Because we must interpret the Acts reasonably to preserve the public's rights in the trust property, we do not hesitate to infer a condition subsequent here.[10]

V.

Thus, the trial court was correct in concluding that the railroad's title is impressed with the public trust. The court prefaced this conclusion, however, by citing a number of cases from other jurisdictions that, in the aggregate, endorsed a wide variety of uses for land held under the public trust. The court stated that all of these uses—including restaurants, hotels, and shopping malls—were "examples of appropriate public uses that are encompassed by the contemporary public trust doctrine." Although the court retained jurisdiction to resolve disputes over proposed uses of the filled lands, it effectively gave CVR and its successors the right to

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[9] "Grants may be adjudged forfeited for the non-performance of a condition annexed to or contained in such grant, whether expressed, or from the nature of the grant, clearly implied." 12 V.S.A. §4983.

[10] The City argues that if this Court does not hold that CVR's title is conditional, with a right of re-entry in the State, then the Court should order that the public retains easements through the filled lands for purposes of fishing, fowling, navigation, and recreation in and upon the adjoining waters. We do not reach this argument.

choose among the listed uses for the property. On cross-appeal the State and the City argue that this was erroneous, and we agree.

Lands held subject to the public trust may be used only for purposes approved by the legislature as public uses. See *Boston Waterfront*, 378 Mass. at 648-49, 393 N.E.2d at 366-67. Any substantial change in the filled lands must therefore be consistent with a legislative grant or mandate, subject to judicial review, and this legislative control cannot be delegated to others.[11] See *Vermont Department of Public Service v. Massachusetts Municipal Wholesale Electric Co.*, No. 86-555, slip op. at 10 (Vt. Sept. 27, 1988).

VI.

Because the railroad and its predecessors have occupied the lands at issue for 140 years and because the City has taxed portions of these lands, CVR maintains that the trial court erred by refusing to invoke the doctrine of laches as a bar to the claims made by the City and the State. CVR also argue that the railroad has relied to its detriment on the past acts and statements of the State and that the State should therefore be estopped from asserting any interest in the property. We disagree on both counts.

Laches arises where a claimant fails to assert a right for an unreasonable and unexplained period of time and where the delay has been prejudicial to the adverse party; under these circumstances, enforcement of the

[11] With respect to the railroad's related argument as to the efficacy of zoning regulations and Act 250 requirements, we add the observation that neither form of regulation is designed to determine an appropriate public use for trust property.

right is held to be inequitable. *Stamato v. Ouazzo*, 139 Vt. 155, 157, 423 A.2d 1201, 1203 (1980). The doctrine of equitable estoppel has a similar foundation in principles of fair play: the purpose of the doctrine is to prevent a party " 'from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.' " *Burlington Fire Fighter's Ass'n v. City of Burlington*, 149 Vt. 293, 298-99, 543 A.2d 686, 690 (1988) (quoting Fisher v. Poole, 142 Vt. 162, 168, 453 A.2d 408, 411 (1982)).

We hold that the claims asserted here cannot be barred through either laches or estoppel. As the Sureme Court of California has observed, the state acts as administrator of the public trust and has a continuing power that "extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust." *National Audubon Society*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360 (citation omitted). In *Thomas v. Sanders*, 65 Ohio App. 2d 5, 413 N.E.2d 1224 (1979), the court considered a claim that a railroad's continued payment of property taxes evinced state recognition of its ownership of trust property. The court rejected the contention, opining that "the state or city cannot relinquish [the public trust property] by acquiescence and estoppel does not apply." *Id.* at 15, 413 N.E.2d at 1231.

In any event, CVR could not prevail on either claim of error. Laches " 'is so much a matter of discretion by the lower court that action by that court should not be disturbed unless clearly shown to be wrong.' " *Stamato v. Ouazzo*, 139 Vt. at 157, 423 A.2d at 1203 (quoting *Laird Properties New England Land Syndicate v. Mad River Corp.*, 131 Vt. 268, 282, 305 A.2d 562, 570 (1973)). Here, CVR did not pursue plans to sell the filled lands

until 1978. Whatever delay occurred in the subsequent assertion of the claims by the City and State was not great enough to establish that the trial court was clearly wrong in rejecting the laches argument. Furthermore, the doctrine of equitable estoppel is rarely invoked against the government, being allowed only where the injustice that would otherwise result is of sufficient magnitude to justify any effect that the estoppel would have upon public interest or policy. *Burlington Fire Fighters' Ass'n. v. City of Burlington*, 149 Vt. 293, 299, 543 A.2d 686, 690 (1988). As a practical matter, this rule alone renders the doctrine of equitable estoppel inapplicable where the public trust is at stake. The trial court did not err in refusing to find either laches or estoppel.

VII.

In sum, the trial court correctly concluded that CVR does not hold title to the filled lands free of the public trust. The court erred, however, by enumerating permissible future uses of the property and by retaining jurisdiction to resolve disputes regarding those future uses. Accordingly, we modify the trial court's order and affirm.

Paragraph 4 of the trial court's declaratory judgment order, dated November 23, 1987, is modified to read as follows: "The filled lands that are shown on Attachments A1-A4 as being owned by Central Vermont Railway, Inc., are held by the railroad subject to the condition subsequent that they be used for railroad, wharf, or storage purposes. Central Vermont Railway may convey the filled lands subject to this condition." Paragraph 7 of the order is vacated.

For the Court:

LOUIS P. PECK
Associate Justice

Judgment Order of the Superior Court, Chittenden County, Dated November 23, 1987.

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN COUNTY COURT
Filed in Clerks Office
NOV 23, 1987
Francis G. Fee
Clerk

CHITTENDEN SUPERIOR COURT
DOCKET NO. S966-84CnC

STATE OF VERMONT and
CITY OF BURLINGTON,

Plaintiffs,

v.

CENTRAL VERMONT RAILWAY, INC.,
ALDEN WATERFRONT CORPORATION
and McLEAN CORPORATION,

Defendants,

ALDEN WATERFRONT CORPORATION,

Third Party Plaintiff

v.

GREEN MOUNTAIN POWER CORPORATION,

Third Party Defendant,

GREEN MOUNTAIN POWER CORPORATION,

Fourth Party Plaintiff,

v.

STATE OF VERMONT, DEPARTMENT OF
TRANSPORTATION and CENTRAL VERMONT
RAILWAY, INC.,

Fourth Party Defendants.

JUDGMENT ORDER

The plaintiffs in this matter filed a Complaint for a Declaratory Judgment relating to the status of title of certain lands on the Burlington Waterfornt. The defendants answered said Complaint and filed various Counterclaims. Following a trial and extensive briefing by all parties, this court issued Findings of Fact and Conclusions of Law dated September 23, 1987 and filed with the clerk's office of the Chittenden Superior Court on September 24, 1987.

NOW THEREFORE, this court hereby issues a Declaratory Judgment pursuant to 12 V.S.A. §4712 as follows:

1. In the area at issue, the water's edge as it was prior to man's alteration thereof, is correctly represented by the green line (the most westerly line) on Exhibits 201 and 202.

Exhibits 201 and 202 have been transferred to plats of recordable size, such plats being entitled "A Portion of Central Vermont Railway, Inc. Lands, Burlington, Vermont, 'Boundary of Filled Lands' ", Sheets 1-4, prepared by Donald L. Hamlin Consulting Engineers, Inc. dated October 1, 1987 (such plats are attached hereto as Attachments A1-A4). The green line has been transferred on to said plats as the line labeled "Boundary Line of Filled Lands."

The boundary of the filled lands is also described by a metes and bounds description attached hereto as Attachment B. (This line shall hereinafter be referenced as the "Boundary Line.")

2. All of the lands east of the Boundary Line are lands above the water's edge of Lake Champlain as it was prior to man's alteration of the shoreline and such lands are not subject to any limitations imposed upon the Filled Lands by this suit.

3. All of the lands west of the Boundary Line are lands below the water's edge of Lake Champlain as it was prior to man's alteration thereof. (These lands are herein referred to as the "Filled Lands.")

4. The Filled Lands which are shown on Attachments A1-A4 as being owned by Central Vermont Railway, Inc. are held by the railroad in fee simple impressed with the public trust doctrine. Central Vermont Railway, Inc. may freely convey the Filled Lands subject to such public trust condition as set forth in the Findings of Fact and Conclusions of Law aforementioned.

5. All other claims of plaintiffs and defendants are Dismissed with Prejudice.

6. Upon this Order becoming final, this Order and attachments hereto shall be recorded in the Land Records of the City of Burlington.

7. This court will retain jurisdiction to resolve any dispute between the parties or their successors or assigns whether a proposed use of the Filled Lands complies with the public trust condition imposed by this Order.

8. This judgment is distinct from, and does not relate to or apply to claims regarding the so-called "Union Station Parcel," otherwise described as 2.735 acres of land with improvements thereon lying at the foot of Main Street, in Burlington, Vermont, and designated as One Main Street, as reflected in a warranty deed from Green

Mountain Power Corp. to Alden Waterfront Corp. recorded at Volume 302, Page 576 of the Land Records of the City of Burlington, all matters regarding which have been dealt with by separate judgment filed October 29, 1987 and recorded at Book _____, Page _____, in the Land Records of the City of Burlington.

Dated at Burlington, County of Chittenden in the State of Vermont, this 23rd day of November, 1987.

STEPHEN B. MARTIN
Stephen B. Martin
Superior Judge

Decision of the Superior Court, Chittenden County, Dated September 24, 1987.

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN COUNTY COURT
Filed in Clerks Office
SEP 24, 1987
Francis G. Fee
Clerk

CHITTENDEN SUPERIOR COURT
DOCKET NO. S966-84CnC

STATE OF VERMONT and
CITY OF BURLINGTON,

v.

CENTRAL VERMONT RAILWAY, INC.,
and ALDEN WATERFRONT CORPORATION., *et al.*

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above matter was heard by the Chittenden Superior Court on January 7 through 9, 13 through 15, and 21, 1987. Plaintiff State of Vermont was represented by J. Wallace Malley, Jr., Esq.' Plaintiff City of Burlington was represented by John L. Franco, Jr., Esq.' Defendant Central Vermont Railway, Inc. was represented by Fred I. Parker, Esq. and Liam L. Murphy, Esq.; Defendants Alden Waterfront Corporation and McLean Corp. were represented by Charles T. Shea, Esq. and Dennis R. Pearson, Esq.' and Third Party Defendant Green Mountain Power was represented by Charles E. Finberg, Esq.

FINDINGS OF FACT

Upon consideration of the oral testimony, the exhibits, the requests to find and the memoranda of law filed by the parties, the Court finds as follows:

1. This declaratory judgment action is brought by the State of Vermont and the City of Burlington, a municipal corporation organized under the laws of the State of Vermont, against Central Vermont Railway, Inc. (CVR), Alden Waterfront Corporation (Alden), and McLean Corporation (McLean). Green Mountain Power Corporation (GMP) is a third party defendant brought into this case by Alden. CVR, Alden, McLean and GMP are Vermont Corporations. CVR's corporate office is located in St. Albans, Vermont, and GMP's office is located in South Burlington, Vermont. The offices for Alden and McLean are in Burlington.

2. This suit involves the nature and status of title to "filled lands" in the waterfront area of Lake Champlain in the City of Burlington. For the purpose of these findings, "filled lands" are defined as those lands located lakeward of the historic low-water mark or the water's edge. The Court was not able to find the low-water mark but was able to find the location of the historic water's edge. See *State v. Cain and Burnett, 126 Vt., 463, 467-8 (1967).*

3. The parcels involved are properties in which Central Vermont Railway, Inc., Alden Waterfront Corporation, and Green Mountain Power Corporation have or have had interests.

4. McLean is an option holder with regard to certain parcels of waterfront land currently owned by CVR. Alden has no exercisable or enforceable right or interest in the option agreement between CVR and McLean.

5. The water's edge in the area at issue prior to man's alteration or filling therof, is correctly represented by the green line (the most westerly line) on Exhibits 200 and 201.

6. The areas west or lakeward of the green line on Exhibits 200 and 201 are all lands which have been artificially filled into Lake Champlain by man.

7. The green line on Exhibits 200 and 201 also indicates the western boundary of the water lots 31 through 70 as indicated on Exhibits 5, 7 and 8. Said lots 41 through 70 were the subject of the Award of Commissioners, Exhibit 206, under which Vermont Central Railway, a predecessor to CVR, acquired a strip of the shoreline in Burlington in 1849.

8. The green line on Exhibit 200 crossed Lake Street at two points. In the limited area where the green line runs to the east of the current Lake Street it is never more than approximately 15 feet from the easterly boundary of Lake Street.

9. Prior to the 1830's, when the first fill was added to construct the first wharf (at the foot of what is now Main Street), the shoreline of the Burlington waterfront followed a relatively smooth arc. Ex. 5, 6.

10. By 1836 a total of three wharves had been filled into the lake in the vicinity of what are now Main, King and Maple Streets.

11. In 1849 the Vermont Central Railroad, a predecessor to CVR, obtained by condemnation a strip of land consisting of the western ends of water lots 41 through 70. The condemnation was made specifically for "depot and accommodation purposes of the Vermont Central Railway." This area would encompass a strip of

land just east of the green line on Exhibit 200 from College Street north of a point just south of Pearl Street. The private owners of the strip of land were compensated for their land.

12. By 1853 Vermont Central had filled in a substantial area lakeward from the condemned water lots and a rail connection had been brought to the waterfront through a ravine to the southeast of the filled area. No evidence was presented from which the Court can find that the railroad sought permission from the State to fill the land.

13. By 1869 more fill had been added by Vermont Central and a passenger depot had been constructed on filled land just north of College Street. A planing mill had also been constructed on fill betewwn Main and College Street.

14. By 1870 a trapezoid-shaped area had been filled in to the north in the area now occupied by Astroline Petroleum Corp.

15. Between 1870 and 1890 further fill was added in the area at the foot of Main Street and in the area north of the region now occupied by Astroline Petroleum.

16. Between 1948 and 1972 CVR added fill to the area between the Moran Station and what is now occupied by Astroline Petroleum. (c). The City holds title to or an interest in 8.6 acres. These holdings include the Moran Station parcel, the Burlington Water Department parcel, the College Street spit, and Lake Street west of the green line.

17. The natural shoreline of Lake Champlain rejoins the point of fill at the northernmost property line of CVR, as shown on Exhibit 201.

18. It is undisputed that all the filled lands north of College Street were filled by CVR or its predecessors during the period the 1827 Act was in effect.

19. The filled lands which lie south of College Street were extended by CVR's predecessors in title from their lands and such filled lands were purchased by CVR. (These lands are shown on Exhibit 202 as the "Purchased Filled Lands.")

20. The lands extended by CVR or its predecessors complied with the express limitation and conditions of the 1827 Act in that they were "located between the lands of person or persons so erecting and the channel of the lake" and they did not impede navigation.

21. The lands extended into the lake by CVR fulfilled the intent of the legislature by promoting commerce and trade and resulting in a great economic benefit to the State.

22. Between 1830 and 1987 the filled land on the Burlington waterfront has undergone an evolution of uses. In the 1830's the initial filled areas or structures in the Lake were narrow piers or docks which extended out to the point of navigation. From approximately 1840 to 1900 the filled land on the Burlington waterfront was used primarily for the following purposes: docking facilities for boats, barges and steamboats carrying both passengers and freight; reception point for lumber floated down the Lake from Canada; storage area for lumber, wood products, and other manufacturing and agricultural products for processing and shipping out by rail, boat and sometimes by wagon; railroad terminal facilities for the Vermont Central, the Rutland Railroad, and the Vermont and Canada; receiving area for passenger traffic coming in and out by steamboat, ferry

and rail; milling facilities on the water for cutting and planing lumber products to be shipped out by rail and boat; and location for a yacht club.

23. There are approximately 41.89 acres of filled lands at issue in this action:

(a). CVR holds title to 31.2 acres.

(b). Alden holds title to 0.33 acres.

(c). The city holds title to or an interst in 8.6 acres. These holdings include the Moran Station parcel, the Burlington Water Department parcel, the College Street spit, and Lake street west of the green line.

(d). The United States government holds title to 1.76 acres.

24. There is substantial acreage of filled land on the Burlington waterfront not subject to this action. These other filled lands are claimed by Woodbury Lumber Company, Lake Champlain Transportation Company, the City, the State and other parties.

25. In 1827 the Vermont Legislature passed legislation herein referred to as the "1827 Act" which granted the right (to persons owning land adjoining Lake Champlain) to erect wharves and storehouses and to extend them into the Lake to a point not to impede ordinary navigation.

26. For those complying with the statute, the 1827 Act further provided that each and every person or persons, their heirs and assigns, should have the exclusive privilege of the use, benefit and control of such wharves and storehouses forever. Section 2 and 3, 1827 Act.

27. At the time of the 1827 Act, Vermont was undergoing a period of economic hard times. The Champlain Canal had opened in 1823, connecting Lake Champlain with the Hudson Valley and it provided Vermont an opportunity to expand its export markets for agricultural and manufactured products. The State wished to encourage commerce and trade but could not expend any public funds to do so. The development of a port at Burlington was important to the economic development of the whole State. In 1827, a breakwater in the Burlington Harbor was completed, and Burlington became an especially desirable port for shipping on the Lake.

28. In the years leading up to 1827, the Legislature frequently made grants to private persons in order to promote commerce and business. In return for such benefits, the grantees were allowed various private benefits.

29. Under the 1827 Act the State sought the benefit of increased commerce and trade. The *quid pro quo* of the Act was the granting of the fee to the lake bed beneath the lands filled under the Act.

30. During the era when the 1827 Act was passed, the Legislature often enacted conditional grants but did not do so in the case of the 1827 Act.

31. From 1822 to 1840, wharves in Burlington provided considerable commercial benefit in the form of shipping to and from vessels on Lake Champlain. They also provided the recreational benefits of fishing and swimming.

32. By 1820, the Lake Champlain Transportation Company was chartered. Soon thereafter, the Burlington Harbor was used for passenger transportation by boat, including steamships.

33. The lands extended into the Lake by CVR clearly fulfilled the intent of the Legislature by promoting commerce and trade, thus creating a great economic benefit to the State.

34. The railroads did not come to Burlington until well after the 1827 Act was passed. They began construction of their lines and depots on their lands, including the filled lands on the Burlington waterfront, in the late 1840's and early 1850's. By 1851, the first rail line had reached the Burlington waterfront area. Vermont Central Railway had constructed a spur line to the waterfront from Essex Junction. Two other railroads, the Rutland Railroad and the Vermont and Canada, soon thereafter completed rail connections to the Burlington waterfront. These rail connections provided both freight and passenger service to the Burlington waterfront.

35. By 1869, railroads had proven to be an immense success in Vermont, and were credited with having caused a miraculous revival of commerce in Burlington, especially in conjunction with their presence on the Burlington waterfront.

36. In the period from 1856 to 1900, the lumber trade flourished on the Burlington waterfront. Indeed, by 1873, Burlington was the third largest lumber port in the United States.

37. In 1874, the Legislature passed the 1874 Act which confirmed legal title in any railroad company which had constructed its railroad beyond the low-water mark into Lake Champlain or had built a wharf, dock, pier or other structure into the Lake in connection with the railroad for its accommodation or use which did not impede ordinary navigation in the Lake. Although the Act was slightly amended and recodified, it remains in effect today. 27 V.S.A. section 1003.

38. Lumbering and related uses of the waterfront declined after 1900. The filled lands, however, continued to be used for railroad and wharfing purposes until the 1970's. Shipping and storage of petroleum was one such use.

39. In 1973, the City passed a zoning ordinance which required the removal of junkyards, storage facilities not involved in manufacturing, and other facilities involved in manufacturing to be removed over time. Along with other economic factors this ordinance has contributed to the reduction of railroad use in the waterfront area.

40. In 1977, in addition to its main line connection with Vermont Railway to the south and its rail yard north of College Street, the CVR had the following eight sources of business on the waterfront: (1) a "team track" for the delivery of freight to members of the public; (2) a freight shed which was leased out for the storage of merchandise; (3) Queen City Iron and Metal, a junkyard and scrap metal dealer; (4) the Moran Station, which accepted shipments of coal for power generation; (5) Gulf Oil tank farms (now Astroline); (6) Texaco Oil tank farms (to the north of Gulf); (7) the Pease Grain mill; and (8) the "Swift Track," where a packing plant was located.

41. At the present time, only the Gulf Oil facility, now occupied by Astroline Petroleum, is an active customer of CVR. The team track had no requests for deliveries in 1986; the freight shed burned down several years ago; Queen City Iron and Metal moved out of the waterfront area because of the zoning ordinance; the Moran Station closed in early 1986 due to obsolescence; Texaco vacated the area and removed its tanks in the late 1970's; the owners of Pease Grain liquidated their business and sold their property to Alden; and, the Swift track was removed when the company was sold.

42. Alden Corporation is the owner of a parcel of land at the foot of Main Street in Burlington, Vermont. This property is known as the Union Station or Green Mountain Power parcel. It is 2.73 acres in area.

43. Alden acquired its parcel at the foot of Main Street from GMP on March 30, 1984, by warranty deed. GMP acquired it in May, 1955, when it was no longer used as a passenger train terminal. Since then, the building has been continuously used for commercial office space.

44. The only Alden land at issue in this suit is a small triangular section at the northwest corner of the Union Station parcel. This triangle is approximately .33 acres in area and represents less than one percent of all the filled land along the Burlington waterfront.

45. The Union Station .33 acre triangle is a landlocked parcel. Its northern boundary abuts College Street. The western boundary abuts the old Rutland Railway right-of-way which the State of Vermont currently owns. In addition, the following parcels lie between the Union Station parcel and the Lake: State of Vermont/Rutland Railway right-of-way, CVR vacant lot used for storage, and the United States Naval Reserve station and land, all west of the northerly half; the State of Vermont/Rutland Railway right-of-way, Woodbury Lumber store and warehouse, and Lake Champlain Transportation Company docks and offices, all west of the southerly half.

46. The distance from the most northwesterly corner of the Union Station triangle to the Lake is 299 feet running entirely along College Street. The distance from the midpoint of the western boundary of the triangle to a slip that serves the U. S. Naval Reserve Station is 220

feet. The distance from the southwesterly point of the triangle is 290 feet if measured at an angle to another slip that the serves the Naval Reserve and the Lake Champlain Transportation Company.

47. Since 1978, CVR has pursued three major plans for selling and developing portions of its land for other than railroad or wharfing uses.

48. In 1978, CVR initiated discussions and negotiations with a developer known as "Triad" as a part of a plan to sell parcels A, B, C and F on Exhibits 200 and 201 for development as condominiums, retail stores and parking. Included in the discussions were substantial portions of its rail yard north of College Street. Since the Moran Station and Pease Grain were still active customers of CVR at the time, CVR planned to retain some of its railroad land for the storage of coal and grain.

49. Around 1980, after the Triad plan had failed to materialize, CVR held similar negotiations and discussions with developer Antonio Pomerleau concerning the same parcels of land. In additions to condominiums and retail stores, the Pomerleau plan also included provisions for a hotel on filled land. CVR executed an option agreement with Pomerleau for the sale of these filled lands in 1983.

50. When the Pomerleau plan also failed to materialize, CVR held discussions and negotiations with Alden in 1983 and 1984 in a further effort to develop its waterfront properties. Discussions focused on the same properties involved in the Triad and Pomerleau plan. In addition, since Pease Grain had closed, Parcel E on Exhibit 200 was also included in the negotiations. There were also some discussions regarding Parcel D.

51. CVR's development plans with Alden called for a multi-use project including residential condominiums, a lakeside hotel, retail commercial space, offices, parking, a boathouse, and park and marina areas in the vicinity of Parcels B, G and H on Exhibit 200.

52. CVR's only remaining customer on the filled land today is Astroline Petroleum, whose lease with the railroad terminates no later than 1997 and whose storage tanks must be moved by 1993. Astroline currently receives its oil shipments primarily by rail and occasionally by lake barge.

53. CVR has entered into a purchase and sale agreement, dated December 10, 1986, in which it has agreed to sell, or to lease with an option to purchase, to McLean the following parcels on Exhibit 200: A, B, C, D and E, together with whatever interest CVR may hold in Parcels G and H. Pursuant to this agreement CVR has already conveyed to McLean Parcel "LS" on Exhibit 200.

54. The City has plans to improve public access to the Lake and to the lakeshore land. For example, it plans improvements to the "College Street Spit" area, to the Roundhouse Point area, to Perkins Pier, and to the Moran parcel and Water Department parcel.

55. CVR or its lessees have paid property taxes on the following parcels shown on Exhibits 200 and 201:

a). Parcel C, in the area formerly occupied by Queen City Iron and Metal, until the departure of Queen City from that parcel in 1976 or 1977.

b). The northwestern corner and southerly portion of Parcel C, both of which were formerly occupied by Shell Oil, since 1967.

c). A one-acre strip of land paralleling the shoreline on Parcel A, since 1981.

d). Parcel E for every year since 1967. Taxes on this parcel are currently paid by Alden.

e). Parcel B, a parcel which CVR has not leased to third parties.

f). Two parcels near the Moran Plant which were formerly leased to the Burlington Electric Department.

g). Portions of Parcel F which are leased to Astroline Petroleum.

56. On the filled land north of the area leased by Astroline, Texaco paid property taxes on the land it leased from CVR and which it used for oil storage. Texaco canceled its lease and removed its tanks sometime around 1979 to 1981. CVR has continued to pay property taxes on this parcel since Texaco's departure.

57. There is public access to Lake Champlain within the City of Burlington at or through the following areas owned or controlled by the City: "Northshore" or "Northgate" beach, which is being developed in connection with an ongoing residential development near the City's northern boundary; Leddy Park; North Beach; the bikepath from North Beach south to the Central Vermont lands at issue: the former Moran generating plant; the Water Department treatment plant; the College Street spit area; the Perkins Pier area adjacent to the Water Department sewage treatment plant south to Roundhouse Point; additional lakefront property recently deeded as a gift to the City by the Mobil Oil Corporation; and Oakledge Park which is a City operated park with substantial lake frontage. Some of these areas are improved with bathhouse, picnic and/or parking

facilities. Besides these areas, there is also the City's reversionary right to take over the Naval Reserve Property. At the southernmost boundary of the City, there is the "Lakeside" neighborhood beach which is ostensibly private but which permits limited public access. In all, there are 14 public parks in the City covering 388 total acres, of which almost 170 acres, are contiguous to Lake Champlain.

58. Over the past century, Plaintiffs have repeatedly recognized the railroad's title to the filled lands. In fact, seven times in the last century, the City or the Federal government has acquired filled lands from the railroad and has paid substantial sums of money for CVR's filled lands.

(a). *Water Plant—Parcel 1*

In 1867, the City of Burlington began leasing a 100 feet by 100 feet parcel of the Railroad Filled Lands for its water pumping station. The rent for such parcel was $150 annually.

In 1897, CVR deeded to the City of Burlington a parcel of Railroad Filled Lands 200 feet by 275 feet (approximately 1.25 acres) for the City Water Plant. The consideration, paid by the City was $10,000. ($8,000 an acre).

(b). *Naval Reserve — Parcel 1*

In 1907, the City adopted a resolution to condemn an approximately 96 feet by 96 feet parcel of Deeded Filled Land south of, and contiguous to, the westerly end of College Street. The City proposed damages of $6,650 ($31,000 + an acre).

The railroad disputed the City's authority to condemn the railroad's land. The issue went to the Vermont Supreme Court which upheld the authority of the City to condemn CVR lands. *See City of Burlington v. Central Vermont Railway Corp.*, 82 VT. 5 (1909).

Finally, in 1912, the Commissioners appointed to appraise damages awarded CVR $8,000 in damages. This award was confirmed by the Chittenden County Court in 1914.

(c). *Naval Reserve — Parcel 2 and End of College Street*

In 1942, the City purchased from CVR two parcels of land.

Parcel 1, a part of the Deeded Filled Lands, was located adjacent to and southerly of the Naval Reserve — Parcel 1 described above. (The two "Naval Reserve" parcels shown as Parcel "G" on Exhibit 200, were later conveyed to the Naval Reserve).

Parcel 2 was a parcel of the Railroad Filled Lands at the end of College Street which was the site of the former CVR dock and now is the site of the "College Street Spit."

The consideration for the two parcels was $4,500.

(d). *Water Plant — Parcel 2*

In 1942, the City purchased from CVR another parcel of Railroad Filled Lands for its water plant. This parcel was located immediately southerly of the water works — Parcel 1. The parcel contained .66 acres.

(e). *Coast Guard*

In 1945 the United States Government condemned a parcel of the Railroad Filled Lands and the adjacent "boat basin." The condemned land was less than .66 acres. CVR was awarded $15,000 in damages for the condemned land.

(f). *Moran Parcel 1*

In 1951, the City purchased from CVR another parcel of Railroad Filled Lands. This parcel was located easterly of the Water Plant Parcels 1 and 2 and northerly of Parcel 1. This parcel contained almost three acres of land.

(g). *Moran Parcel 2*

In 1970, the City purchased from CVR another parcel of Railroad Filled Lands. This parcel is located north of Moran Parcel 1. This parcel contains approximately 1.5 acres.

CONCLUSIONS OF LAW

59. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) the United States Supreme Court promulgated the public trust doctrine. The question considered in that case was "whether the legislature was competent to. . .deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters." *Id.* at 452. The Court answered that question by noting the State holds title:

> in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State.

Id. The Supreme Court of Vermont has also noted the "[t]he bed or soil of such boatable lakes in this State is held by the people in their character as sovereign in trust for public uses for which they are adapted." *Hazen v. Perkins*, 92 VT. 414, 419 (1918) (citations ommitted).

However, neither *Illinois Central* nor *Hazen* precludes a state from granting fee simple absolute to lakebeds, or portions thereof, under certain circumstances. Hence, this Court turns to contemporary cases to determine the parameters of the modern public trust doctrine.

60. The Court finds the approach used in *City of Berkeley v. Superior Court*, 606 P.2d 362 162 Cal. Rptr. 327 (Cal. 1980) persuasive. The Supreme Court of California in *City of Berkeley* was dealing with tidelands in the San Francisco Bay area and actually determined how property-owners' titles were affected by the application of the public trust doctrine. The *City of Berkeley* court adopted

> an intermediate course: the appropriate resolution is to balance the interest of the public in tidelands . . .against those of the landowners . . . In the harmonizing of these claims, the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.

Id. at 373. The court continued by stating that "[a]n obvious illustration of absolute title is a parcel that no longer has Bay frontage." *Id.* at 374.

The Court concludes that the Union Station .33 acre triangle falls within this category. It is a landlocked parcel. Indeed, a number of parcels owned by others lie

between the Union Station parcel and the Lake. Among these are the U. S. Naval Reserve Station and land, a vacant lot owned by CVR, the State of Vermont/Rutland Railroad right-of-way, Woodbury Lumber store and warehouse, and Lake Champlain Transportation Company docks and offices. The Union Station triangle involves an insignificant portion of the "filled land" in question and releasing the property from the public trust interest will not impair the State's public trust interest in the lands and waters remaining. Hence, this Court concludes that Alden Waterfront Corporation holds the .33 acre Union Station triangle in fee simple absolute. Alden is entitled to a Judgment dismissing Plaintiffs' action and GMP is entitled to a judgment dismissing the third party complaint. All other claims between Plaintiffs, Alden and GMP are dismissed.

61. The 1827 Act by the Vermont Legislature which granted to persons owning lands adjoining the Lake the right to erect wharves and storehouses and to extend the same into the Lake to a point not to impede ordinary navigation, met the public trust requirements established in *Illinois Central. Id.* at 452. The 1874 Act confirmed legal title in any railroad company which had constructed its railroad beyond the low-water mark into the Lake or had built a wharf, dock or pier or other structure into the Lake in connection with the railroad for its accommodation or use which did not impede ordinary navigation. This Act also complied with the guidelines established in *Illinois Central. Id.* at 452 (the State may grant parcels of the submerged lands so long as their disposition is made for public trust purposes). Both of these Acts granted rights which dealt with "the interest of the people in the navigation of the waters and in commerce over them," *id.* at 452, by allowing and

encouraging "the erection of wharves, docks and piers." *Id.* Hence, the grant of legal title to the railroads was a valid legislative act.

62. The title granted is a fee simple impressed with the public trust. Hence, the remaining lands at issue in this action (lands currently held by CVR) are subject to the public trust doctrine. *Id.; Hazen* at 419; and, *City of Berkeley* at 373. This, however, does not mean that should the railroad convey, or attempt to convey, such lands that the State could reclaim the land. Indeed, the only time that the State may reclaim such land is if the original grant were invalid "as a gross perversion of the trust over the property under which it is held." *Illinois Central* at 455. This, of course, is not the case here. Moreover, even if the State were to reclaim land under such circumstances, "any improvements made on such lands could not be appropriated without compensation." *City of Berkeley* at 373 (citing *Illinois Central* at 455).

63. Although the public trust doctrine as laid out in *Illinois Central* talked only of the public's enjoyment of navigation of the waters, commerce over them, and the liberty of fishing thereon, a number of contemporary cases hold that other uses are within the public trust concept. Among these cases are:

> *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981). (Redevelopment and improvements to Coast Guard support center are appropriate uses for land impressed with the public trust doctrine.)
>
> *People v. City of Long Beach*, 338 P.2d 177, 179 (Ca. 1959). (When dealing with the use of trust funds for the construction of a harbor-front YMCA, Justice Traynor noted that "[w]e entertain no doubt that the specific purpose set forth in the 1935

statute to promote 'the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor and commerce, fishery, and navigation,' is not only consistent but in direct aid of the [public trust doctrine.]")

Martin v. Smith, 184 Ca. App. 2d 571, 578, 7 Ca. Rptr. 725, 728 (1960). (Restaurants, bars, hotels, pools, shopping complex fall within the public trust doctrine.)

Clement v. Chicago Park District, 449 N.E.2d 81, 83-84 (Ill. 1983). ("Further, we agree with the appellate court that under the standards formulated in *Paepcke v. Public Building Com.*, (1970), [sic] 46 Ill. 2d 330, 263 N.E.2d 11, the creation of the driving range did not constitute a violation of public trust.")

Save Our Wetlands, Inc. v. Orleans Levee Board, 368 So. 2d 1210, 1213 (La. Ct. App. 1979). (Dealing with Louisiana Constitutional provision which stated: "Except as provided in this Section, the bed of a navigable water body may be reclaimed only for a public use." The Court found that "[t]he operation of an airport for the benefit of the public is clearly a public use.")

New Jersey Sports & Exposition Authority v. McCrane, 292 A.2d 580 (N.J. Super. Ct. Law Div. 1971). ("A sports stadium is for the recreation of the public and is hence a public purpose . . . Generally speaking, anything calculated to promote the education, the recreation or the pleasure of the public [is a public purpose]". *Id.* at 595 [quoting *Martin v. Philadelphia*, 215 A.2d 894, 896, 420 Pa. 14, 17 (1966)].)

Morse v. Oregon Division of State Lands, 590 P.2d 709, 711 (Or. 1979). ("Our conclusion is that the [public trust] doctrine does not prohibit other than water-related uses in situations like the present one [construction of an airport runway].")

Wisconsin's Environmental Decade, Inc. v. Wisconsin Department of Natural Resources, 340 N.W.2d 722, 737-38 (Wis. 1983). (Setting out appropriate findings and conclusions of the hearing examiner stated that "[t]he issuance of these permits [to build a shopping mall] will not . . . be contrary to the public trust doctrine.")

Town of Ashwaubenon v. Public Service Commission, 125 N.W.2d 647, 653 (Wis. 1964) ("One does not have to deny either the trust doctrine or the state's paramount title to determine that an intrusion [private filling to bulkhead line] upon the navigable waters is permissible.")

State v. Village of Lake Delton, 286 N.W. 2d 622 (Wis. Ct. App. 1979). (Ordinance zoning small area of lake for water ski exhibition licensees was permissible under the public trust doctrine. Indeed, the court noted that "[o]ther types of and interferences with the public uses of the water have been approved when necessary to accomplish public purposes." *Id.* 632.)

This Court holds that all of the above are examples of appropriate public uses that are encompassed by the contemporary public trust doctrine. Indeed, we note that:

> [a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation . . . The modern trend of authority is to expand and liberally construe the meaning of "public purpose." The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy its benefit.

New Jersey Sports at 592 (citations omitted). Moreover, "[t]o be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society." *Id.*

64. Thus, this Court concludes that CVR holds the filled lands at issue in this action in fee simple impressed with the public trust doctrine. This means that the railroad is free to convey such lands to any party, and those parties to any other parties, so long as such land is used for a public purpose.

Plaintiff, CVR and McLean are entitled to a Declaratory Judgment to this effect. All other claims and counterclaims are dismissed.

Attorneys for CVR, Alden, McLean and GMP to prepare appropriate Orders; attorneys for Plaintiffs to approve as to form.

DATED at Burlington, County of Chittenden and State of Vermont, this 23rd day of September, 1987.

STEPHEN B. MARTIN
Stephen B. Martin
Superior Judge

Vermont Acts of 1827, No. 38:

An Act authorising the erection of wharves and shorehouses in Lake Champlain.

Sec. 1. It is hereby enacted by the General Assembly of the State of Vermont, that each and every person owning lands adjoining Lake Champlain, within this state, be and they hereby are fully authorised and empowered to erect any wharf or wharves, storehouse or storehouses, and to extend the same from the land of the person or persons, so erecting, in a direct course, into Lake Champlain, to any distance they may choose within the state.

Provided, such wharf or wharves, storehouse or storehouses shall be located between the lands of the person or persons, so erecting, and the channel of the lake.

Provided also, that such wharf or wharves, storehouse or storehouses shall not be extended so far into said lake as to impede the ordinary navigation in passing up and down said lake, as heretofore accustomed.

Sec. 2. It is hereby further enacted, that all persons, their heirs, or assigns, who may have erected any wharf or wharves, storehouse or storehouses, agreeably to the provisions of any grant heretofore made or agreeably to the provisions of this act, shall have and enjoy the same privileges as if the same had been erected under the restrictions provided in this act.

Sec. 3. It is hereby further enacted, that each and every person or persons, their heirs or assigns, shall have the exclusive privilege of the use, benefit and control of any wharf or wharves, storehouse or storehouses, forever, which may hereafter be erected in said lake, agreeably to the provisions of this act. [Passed Nov. 12, 1827.]

The Act of 1827 was codified and slightly modified in the following compilation of statutes: Revised Statutes of 1840, Chapter 57, Sec. 5 and Sec. 6; General Statutes of 1863, Chapter 64, Sec. 5 and Sec. 6; Revised Laws of 1880, Chapter 97, Sec. 1919 and Sec. 1920; and Vermont Statutes of 1894, Chapter 105, Sec. 2204 and Sec. 2205.

The Act of 1827 was amended in 1906 as follows:

> Ownership of Property Extending into Lake Champlain.
>
> 2204. Right to construct wharf. A person owning lands adjoining Lake Champlain may erect a wharf, storehouse or breakwater to protect the same and extend the same from his land in a direct course into the lake or any distance within the state between such land and the channel of the lake. Such wharf, storehouse or breakwater shall not extend into the lake so as to impede ordinary navigation.
>
> 2205. Same; control. Wharves, storehouses or breakwaters erected agreeably to the provisions of grants heretofore made or on this chapter, may be exclusively used and controlled by the persons erecting them, their heirs or assigns.

These provisions were subsequently codified as Title 27, Sec. 1001, 1002 of the Vermont Statutes Annotated. In Acts of 1967, No. 308 (Adj. Sess.), Sec. 10, Section 1001 was repealed. Section 1002 remains in effect.

Vermont Acts of 1874, No. 85:

An Act to confirm the Title to Certain Structures in Lake Champlain

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. Whenever any railroad company in this state shall have constructed their railroad beyond low watermark into Lake Champlain, or shall have built out into said lake any wharf, dock, pier, or other structure in connection with such railroad, for its accommodation or use, which shall not impede ordinary navigation in passing up and down said lake, such building and structures are hereby declared to be lawful, and the legal title thereto is hereby confirmed to such railroad companies respectively, which build the same or others lawfully claiming through them.

Sec. 2. This act shall take effect from its passage.

[Approved, November 24, 1874.]

The Act of 1874 was codified and slightly modified in the following compilation of statutes: Revised Laws of 1880, Sec. 1921; Vermont Statutes of 1894, Sec. 2206; Public Statutes of 1906, Title 14, Sec. 2570; General Laws of 1917, Title 14, Sec. 2732; Public Laws of 1933, Title 11, Sec. 2385; and Vermont Statutes of 1947, Title 11, Sec. 2636. In the last compilation the statute appears as follows:

> 2636. Title confirmed. when a railroad company in this state has constructed its railroad beyond low watermark into Lake Champlain or has built into such lake a wharf, dock, pier or other structure in connection with such railroad for its accommodation or use which does not impede ordinary navigation in such lake, such building and structures shall be

> lawful and the legal title thereto shall vest in such railroad company or others lawfully claiming under it.

This provision was subsequently codified in Title 27, Sec. 1003 of the Vermont Statutes Annotated, and such provision remains in effect.

Supreme Court, U.S.
FILED
APR 13 1990
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CLERK

No. 89-1489

In The

Supreme Court of the United States

October Term, 1989

CENTRAL VERMONT RAILWAY, INC.,

Petitioner,

vs.

STATE OF VERMONT AND
CITY OF BURLINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court.

JOINT RESPONSE OF THE STATE OF VERMONT AND THE CITY OF BURLINGTON TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can Petitioner CVR raise a taking of property claim before this Court, when it was not raised below?

2. Can a decision by a state supreme court, defining the nature of title held by Petitioner CVR under state statues and state public trust law, raise any question of federal law?

3. Having acknowledged in its Answer and Counterclaim "a cloud on [its] title" and "uncertainty and insecurity with respect to [its] rights, duties, status and legal relations in regard to all of [its] filled lands," and having affirmatively asked the Vermont courts to remove said cloud on its title and to remove the uncertainty and insecurity respecting its rights, can Petitioner CVR now contend that the Vermont courts have "transformed" a fee simple absolute title into some newly-created form of title in order to avert a taking and avoid the requirement of just compensation?

PARTIES

There are three parties to this appeal: Petitioner Central Vermont Railway, Inc. ("CVR"), a Vermont corporation with its principal place of business in St. Albans, Vermont, Respondent State of Vermont ("State") and Respondent City of Burlington ("City"), which is a duly incorporated municipality within the State of Vermont. The State and the City are filing herewith a joint response to CVR's Petition for Writ of Certiorari.

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Vermont Act of 1874 ..... *passim*

JURISDICTION

There is no jurisdiction to review the Vermont Supreme Court's decision by Writ of Certiorari under the terms of 28 U.S.C. §1257, because Petitioner never asserted to the Vermont courts any claim that a finding of a fee simple subject to condition subsequent would constitute an impermissible taking. *See infra* Argument I. CVR's Answer and Counterclaim in the trial court proceedings below (App. 1) made no reference to any such claim and CVR never even mentioned the Fifth and Fourteenth Amendments to the United States Constitution until it filed its Petition for Writ of Certiorari with this Court. Petitioner cannot satisfy the requirement of this Court's Rule 14.1(h) because it cannot demonstrate that it properly raised the federal taking claim before both the trial court and the appellate court below.

STATEMENT OF THE CASE

A. Procedural History and Nature of the Case

This suit does not involve a taking of any property interest held by Petitioner CVR. From its inception, this has been an action initiated by the State of Vermont and the City of Burlington to declare what interests were granted to CVR and its predecessors through two nineteenth century Vermont statutes, one being an 1827 Wharfing Act ("1827 Act"), and the other being an 1874 enactment ("1874 Act") pertaining to railroads.

The State and the City argued below that neither the 1827 nor the 1874 Act dissolved the public's rights under

the state public trust doctrine in lands filled into Lake Champlain, and that neither statute, alone or in combination, had ever granted a fee simple absolute title in CVR or its predecessors. The State and the City asked the court to declare the interests of the parties and proposed several alternative interpretations of the two acts which would preserve the public trust. Among those alternatives were: a franchise, a fee simple determinable, a fee simple subject to a condition subsequent, a fee simple subject to revocation by the Legislature, and a fee simple subject to easement by the public.

CVR acknowledged in its Answer and Counterclaim (App. 1) that there was a "cloud on [its] title" and that there was "uncertainty and insecurity" with respect to its rights and interests in all of its filled land. CVR affirmatively asked the state court to remove the cloud on its title and to remove the uncertainty and insecurity respecting its rights. App. 6, 9, 10.

There are many inaccuracies and omissions in CVR's Statement of the Case which will be addressed below. Respondents invite the Court's attention to the first three pages of the Vermont Supreme Court's opinion (CVR's Petition, App. 2a-4a) for an accurate and objective description of the background of the case.

Contrary to the inferences created at pages 4 and 9 of CVR's Petition, the City and the State have never conceded that CVR owned a fee simple absolute interest in the disputed property. The City's levying of taxes on some of CVR's property over the years may suggest the City's belief that the properties were not exempt from

local taxation, but the imposition of a tax says nothing about the type or quality of title held by CVR. Nor do the purchases of property from CVR by the City and the federal government establish in any way that CVR's title was in fee simple absolute.

CVR tries to portray the Vermont Supreme Court's decision as an "unique" interpretation of the law. CVR's Petition at 5. However, the rules of construction cited by the Vermont court were in each instance based on case law and statutes in Vermont and other states. CVR's Petition, App. 11a, 12a, 14a, 15a, 16a, 17a.

CVR repeatedly asserts that it had long held a fee simple absolute estate, which was taken away by the Vermont Supreme Court. *E.g.* CVR's Petition at 5. The reality is that the Vermont court, at the request of CVR and the other parties, declared for the first time the nature and extent of the property interests conveyed in the two nineteenth century acts.

At page 5 of its Petition, CVR claims that it raised the present taking claim in both courts below. As explained in Argument I, *infra*, such was not the case.

B. Statement Of Facts

Again the State and the City invite this Court's attention to the factual description in the Vermont Supreme Court's decision. CVR's Petition, App. 2a-4a.

In describing the 1827 Act, CVR represents "wharves" to have been understood to be permanent structures requiring appropriation of the lakebed, with no implications as to the uses to which those structures

would be put. The Vermont Supreme Court, however, expressly indicated that "wharves" were structures for a particular use: " . . . so that boats can be brought alongside them to load and unload cargo and passengers." CVR Petition, App. 2a, n.1.

At page 7 of its Petition CVR noted that the filled lands in question promoted commerce and trade and brought great economic benefit to Vermont. The City and the State agree with this observation. The Vermont Supreme Court recognized these benefits as appropriate "public purposes" under the Vermont public trust doctrine. CVR Petition at 9a, n.3. What CVR failed to mention was that CVR and its predecessors were granted the wharfing right free of charge. CVR paid no rent for its use of a public resource (a part of Lake Champlain) and earned profits from its activities in the Lake for many decades.

CVR also observed that the Vermont Legislature confirmed in 1874 that railroads held "legal title" to filled lands. CVR Petition at 8. Omitted from this discussion was the Vermont Supreme Court's recognition that "legal title" was a term of art from trust law, and that the use of the term in the 1874 Act also acknowledged that "beneficial title" was still vested in the public. CVR Petition at 13a.

CVR seems to infer that it has continuously been paying local property taxes to the City on all of the filled lands. This is not the case. As the trial court explained, local taxes were paid only on parts of the filled lands, depending on their uses, and only during certain years. CVR's Petition, App. 36a, 37a.

CVR also asserts at pages 9 and 10 of its Petition that a City zoning ordinance was the cause for a reduction in rail uses on its property. This issue was not addressed by the Vermont Supreme Court, but the trial court found only that the City zoning ordinances "contributed to" a reduction of rail uses "along with other economic factors." CVR Petition at 33a, para. 39. The trial court went on to describe how CVR pursued three major development plans for non-rail uses after 1978. CVR Petition, App. 35a-36a.

ARGUMENT

I.

PETITIONER RAISES THE PRESENT FEDERAL CONSTITUTIONAL QUESTION FOR THE FIRST TIME IN ITS PETITION FOR CERTIORARI.

Petitioner CVR has never before claimed that the determination of its title interest as a fee simple subject to condition subsequent would constitute an unconstitutional taking. Because CVR raises this claim for the first time, the petition should be denied. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

CVR asserts at page 5 of its Petition that it raised this taking issue "in both courts below." A review of the records reveals otherwise. Nowhere in CVR's Answer and Counterclaim before the trial court is there any assertion of a taking or mention of any right of compensation. App. 1-12. Nor is there any reference to the Fifth or Fourteenth Amendments to the United States Constitution, or any other federal authorities. Because of these

omissions it comes as no surprise that neither of the courts below addressed any taking claim.

As this Court has recognized, " . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 501 (1987) (emphasis in original). Since CVR did not even plead a taking claim in its Answer and Counterclaim, it cannot now assert that the state courts were apprised of the nature and substance of this claim.

Conspicuously absent from CVR's Petition is any reference to any portion of the trial court record where it raised the present taking argument. Instead, CVR references only one sentence on one page of its 37-page opening brief before the Vermont Supreme Court, and other portions of its reply brief before the same court. The Vermont Supreme Court will not normally consider issues raised for the first time on appeal. *In re Johnston*, 145 Vt. 318, 488 A.2d 750 (1985). This failure by CVR to present its purported federal question to the Vermont Supreme Court in conformance with state procedure is, in and of itself, grounds for denying review by this Court. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

A review of the several pages cited by CVR in its Reply Brief to the Vermont Supreme Court demonstrates that CVR's present taking claim was *not* raised below. All of the references pertain to instances where the words "taking" or "compensation" were used in discussing *other*

title assertions raised by the State and the City, but not the claim for a fee simple subject to a condition subsequent.[1] At pages 6 through 9 of its Reply Brief, where CVR did address the issue of a fee simple subject to condition subsequent, CVR made no mention whatsoever of any taking claim.

The reasons for requiring a petitioner to raise the federal issues before the state courts is to allow the parties to develop the issues and "permit the state courts to exercise their authority . . . to construe state statutes so as to avoid or obviate federal constitutional challenges . . . ." *Webb v. Webb, supra*, 451 U.S. at 500. The Vermont Supreme Court's opinion never mentions any federal question because it decided the matter solely on the basis of state law (*see infra* Argument II), and also because CVR never raised the federal issue in the context of a fee simple subject to condition subsequent.

It is patently unfair and inappropriate for petitioner now to raise a constitutional issue where the state court has not had the opportunity to pass upon it. *See Monks v. New Jersey*, 398 U.S. 71 (1970).

II.

THE CONSTRUCTION OF PROPERTY RIGHTS UNDER THE VERMONT PUBLIC TRUST DOCTRINE IS A MATTER OF VERMONT LAW.

It has been long settled that under our federal system property ownership is governed by the laws of the

---

[1] CVR mentioned the taking issue in responding to three other alternative claims: (1) that CVR possessed a franchise interest, (2) that any interest, regardless of label, was revocable by the Legislature, and (3) that CVR's interest would be subject to easements by the public.

several states and not by federal law, and that there is no substantive property law found in either the Fifth or the Fourteenth Amendments. *Preseault v. I.C.C.*, 58 U.S.L.W. 4493 (U.S. Feb. 21, 1990) (No. 88-1076) (O'Connor, J., concurring); *Hughes v. Washington*, 389 U.S. 290, 295 (1967). It is also well settled that the determination of what rights or privileges attach to grants of submerged public trust lands under navigable waters is a matter for the states to decide under state law. *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Appleby v. City of New York*, 271 U.S. 364 (1926); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Barney v. Keokuk*, 94 U.S. 324 (1877); *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845).

The decision of the Vermont Supreme Court neither presented nor decided a question of federal law. Rather it construed grants made by the Vermont General Assembly under the 1827 Act and the 1874 Act.

The Vermont Court rejected CVR's assertion that these acts granted to it fee simple absolute title to filled lands created by CVR's predecessor Vermont Central Railway.[2] Significantly, the Court also rejected the theory advanced by the State and the City that these Acts granted CVR only a franchise interest. CVR Petition, App. 15a-16a. The Vermont Court held that these enactments contained no clear expression of interest by the Legislature to abandon the public trust interest in the lands. Rather, it confirmed that the railroad held only "legal

---

[2] In 1927 Vermont Central was reorganized as the Central Vermont Railway in bankruptcy proceedings.

title," a term of "common parlance in the law of trusts," but that "beneficial title" remained in the public. CVR Petition, App. 13a.

After surveying the law of other states, particularly that of the adjoining New England State of Massachusetts, the Vermont Court concluded that the nature of the title was a fee simple subject to the condition subsequent that the property be used for railroad, wharfing and storage purposes, with the State having a right of reentry in the event that the condition is breached by the railroad. CVR Petition, App. 16a. This is a classic example of a state court defining property rights under state law.

CVR invents a federal question by constructing a false syllogism:

> (1) Major Premise: Stripping a property owner of a fee simple absolute interest in land without compensation is an unlawful taking.
>
> (2) Minor Premise: The Vermont Supreme Court stripped CVR of a fee simple absolute interest without compensation.
>
> (3) Conclusion: The Vermont Supreme Court committed an unlawful taking.

The obvious flaw in CVR's analysis is its claim that the Vermont Court stripped it of a pre-existing property interest. The court's declaration could not be a taking of a fee simple absolute interest, because it held that CVR never had such an interest.

The concurring opinion in the recent *Preseault* case reiterates the long-standing principle that, in determining whether a taking has occurred, courts must be mindful

that property interests are not created by the Constitution. Rather, they are defined by existing rules and understandings that stem from an independent source such as state law. *Preseault v. I.C.C., supra* (O'Connor, J., concurring), quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Having failed to show that it held a fee simple absolute title under Vermont law,[3] CVR has demonstrated no federal "taking" claim.

III.

CVR ITSELF SOUGHT AND OBTAINED A DECLARATION OF ITS TITLE UNDER VERMONT LAW.

Petitioner's Statement of the Case has a glaring omission: that in its Answer and Counterclaim CVR *itself* sought a declaration " . . . removing the cloud upon Defendant's title to its land on the Burlington waterfront." App. 11. CVR acknowledged in that same document "uncertainty and insecurity with respect to CVR's rights, duties, status and legal relations in regard to all [CVR's] filled lands," and affirmatively asked the court to remove this uncertainty and insecurity. App. 9, 10.

CVR was dissatisfied with the declaration provided by the trial court and appealed to the Vermont Supreme Court, which in turn granted the cross-appeal brought by the State and City. That CVR is dissatisfied with the

---

[3] The Vermont Supreme Court decision here casts doubt on whether such a grant could be within the Legislature's power, even it had been attempted. CVR Petition, App. 9a-11a.

outcome of its appeal provides no federal question upon which to justify review or intervention by the federal courts.

That CVR and its predecessor Vermont Central *"asserted* fee simple absolute title to the filled lands for the last 140 years" (CVR Petition at 8, emphasis added) does not automatically translate into a *reliance* on such a title. CVR Petition at 16. Not only is CVR's argument entirely self serving, it is belied by the facts. No question arose regarding the title to CVR's property from the 1840's to the 1970's because the property was continuously used for railroading, wharfing and storage. Only when CVR sought to undertake different uses, did the issue arise. CVR asked the trial court to remove the cloud on its title, because it wanted to sell its land for commercial redevelopment but could not rely on the "assertion" of fee simple absolute title absent a judicial declaration.

Unlike other claims of "expectancy" of property rights where there have been a long series of conveyances, all of the filled lands at issue in the Vermont Court decision were created by CVR or its predecessor railroads and have remained in CVR's possession[4] to the present day.

CONCLUSION

The Vermont Court was confronted with no federal question, and decided no federal question. CVR itself

[4] The exception is a one-acre parcel acquired in the 19th century as a part of previously constructed wharf.

presented the courts with a state law issue to quiet title and declare the rights to filled public trust lands located in the Burlington Harbor.

By declaring CVR was granted only legal title, that the public retained beneficial title, and that the State held a right of re-entry for breach of a condition subsequent, the Vermont Court decided trust rights under state law.

CVR obtained the very declaration that it sought. That CVR is dissatisfied with the result does not create a "taking" claim under the U.S. Constitution and presents no other federal questions. The Petition should therefore be denied.

Dated: April 13, 1990

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STATE OF VERMONT

CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT

DOCKET NO. S966-84CnC

STATE OF VERMONT and CITY OF BURLINGTON,

Plaintiffs

v.

CENTRAL VERMONT RAILWAY, INC. and ALDEN WATERFRONT CORPORATION,

Defendants

ALDEN WATERFRONT CORPORATION,

Third Party Plaintiff

v.

JOHN McKENZIE PACKING CO., INC., SYLVIA TURMELLE, DEVELOPMENT AND DESIGN ASSOCIATES, GREEN MOUNTAIN POWER CORPORATION, A. D. PEASE GRAIN CO., INC., and WILLIAM SCOTT,

Third Party Defendants

DEVELOPMENT AND DESIGN ASSOCIATES,

Fourth Party Plaintiff

v.

WILLIAM H. CLELAND and

ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

BARBARA J. CLELAND,

Fourth Party Defendant

JOHN McKENZIE PACKING CO., INC.,

Fourth Party Plaintiff

v.

WILSON FOODS CORPORATION,

Fourth Party Defendant

SYLVIA TURMELLE,

Fourth Party Plaintiff

v.

T. A. HAIGH LUMBER CO., INC.,

Fourth Party Defendant

GREEN MOUNTAIN POWER CORPORATION,

Fourth Party Plaintiff

v.

STATE OF VERMONT, DEPARTMENT OF TRANSPORTATION and CENTRAL VERMONT RAILWAY, INC.,

Fourth Party Defendant

NOW COMES Defendant, Central Vermont Railway, Inc., by and through its Attorneys, Langrock Sperry Parker & Wool, and Answers Plaintiff's Amended Complaint as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. This Defendant makes no answer to the allegations in Paragraph 4 of the Amended Complaint as the allegations are not directed to this Defendant.

5. The allegations contained in Paragraph 5 of the Complaint state a legal conclusion, therefore no answer is necessary, but to the extent that an answer to such allegations is necessary, such allegations are denied.

6. The allegations contained in Paragraph 6 of the Complaint state a legal conclusion, therefore no answer is necessary, but to the extent that an answer to such allegations is necessary, such allegations are denied.

7. This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Amended Complaint, and therefore denies the such allegations.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. This Defendant admits that the Acts of 1827 and Act of 1874 granted landowners adjoining Lake Champlain a license to fill in the lake beyond low water.

This Defendant denies that upon completing such construction into the lake, such landowners became vested with a limited title to such filled lands and the lakebed beneath. This Defendant also denies that such lands remain subject to the doctrine of public trust.

14. Denied.

15. This Defendant admits that it has entered into a contract with Defendant Alden in regard to the purchase and sale of certain portions of such lands now held by this Defendant along the lakefront in Burlington.

This Defendant admits that a portion of these lands consist of so-called "filled-lands", which for the purpose of this Answer are defined as: "land lying lakeward (or below) the historic (pre 1845) low water of Lake Champlain".

This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the "filled-lands" lie within the original Burlington Harbor and therefore denies such allegation.

This Defendant makes no answer regarding the allegations that Defendant Alden holds certain lands along the lakefront as such allegation is not directed to this Defendant.

16. This Defendant admits that it and Alden entered into a "Right of First Refusal" and an "Option to Lease" dated October 23, 1983 and that such agreements were terminated by an agreement dated December 10, 1985.

This Defendant admits that a portion of the property subject to these agreements are "filled-lands" but denies that all such property are "filled lands".

This Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the "filled-lands" lie within the original Burlington Harbor and therefore denies such allegation.

17. Admitted (except "McClean" should be "McLean").

18. Denied, except to the extent of the following:

This Defendant acquired its title to all its lands along the Burlington waterfront by virtue of "Deed under decrees of the District Courts of United States for the District of Vermont, for the District of Massachusetts, for the District of Connecticut and for the Southern District of New York. Such deed is from Charles D. Watson, Special Master, George A. Gaston and John W. Redmond, as Receivers, The New York Trust Company, as Trustee, Central Vermont Railway Company, Horace H. Powers and E. Deschenes" which is dated January 31, 1930 and is filed in Volume 100, Pages 114-129 of the Land Records of the City of Burlington.

This Defendant does admit that its predecessor in title, the Vermont Central Railroad Company (VCRC) obtained and paid for certain property and rights on the Burlington waterfront north of the south line of College Street in 1849. Portions of the property obtained by VCRC were the westerly portions of the so-called "Water Lots 41-71". Other portions of the property obtained by VCRC were the westerly portions of lots of land north of Lot 70, including the westerly portions of lots of land which would include the present-day Battery Park.

This Defendant does admit that VCRC acquired and paid for the riparian rights appurtenant to the property it acquired, including the rights granted under the Act of 1827 (see paragraph 8 of the Amended Complaint and this Answer).

This defendant does admit that at the time of the acquisition of the property and appurtenant rights by VCRC that no rights granted under the Act 1827 had been exercised by the former landowners.

This Defendant does admit that VCRC did exercise its rights under the Act of 1827 by wharfing out and filling in the lakebed of Lake Champlain below the historic low water.

19. Admitted.

20. This Defendant admits the allegations of Paragraph 20 of the Amended Complaint with the explanation that this Defendant further asserts that such statutes should be construed as also extinguishing any interests of the Plaintiff City of Burlington, including any interests which may have been granted by virtue of the City Charter, Act No. 298, Acts of 1949, Section 48 (LVI), Acts of the Vermont General Assembly, and extinguishing any interests of the public under the so-called "doctrine of public trust".

21. Admitted with the explanation that this Defendant further asserts that the uncertainty and insecurity also inhibits the ability of the Defendant to convey, develop, and/or use the property.

AFFIRMATIVE DEFENSES

First Defense

22. Plaintiffs have waived any right to make any claims against this answering Defendant.

Second Defense

23. Plaintiffs' claims are barred by the doctrine of estoppel.

Third Defense

24. Plaintiffs' claims are barred by the doctrine of laches.

Fourth Defense

25. Plaintiffs' claims are barred by the Statute of Limitations.

Fifth Defense

26. This Court lacks subject matter jurisdiction over any matter relating to the cessation of the use of this Defendant's property for railroad purposes and therefore lacks jurisdiction over Plaintiff's Requests for Relief contained in the Amended Complaint's Request for Relief Paragraphs 2.1 and 2.2.

COUNTERCLAIM

27. Defendant realleges Paragraphs 1-3, 5-6, 8-12 of this Defendant Answer.

28. This Defendant acquired title to all of its property on the Burlington Waterfront by virtue of a deed entitled "Deed under decrees of the District Courts of United States for the District of Vermont, for the District of Massachusetts, for the District of Connecticut and for the Southern District of New York. Such deed is from Charles D. Watson, Special Master, George A. Gaston and John W. Redmond, as Receivers, The New York Trust Company, as Trustee, Central Vermont Railway Company, Horace H. Powers and E. Deschenes" which is dated January 31, 1930 and is filed in Volume 100, Pages 114-129 of the Land Records of the City of Burlington.

29. This Defendant's predecessors-in-title exercised their riparian rights to their lands on the Burlington waterfront, including the rights granted under the Act of 1827 to extend their property beyond the low water of Lake Champlain. This Defendant asserts that upon the exercise of such rights its predecessors-in-title became vested with fee simple absolute title to such filled lands and the lakebed beneath such filled lands.

30. This Defendant also asserts that the Act of 1874 further confirmed its predecessors-in-title fee simple absolute title to the filled lands and lakebed beneath.

31. The Plaintiffs assert that the above referenced statutes granted landowners adjoining Lake Champlain a license to fill in the lake beyond the low watermark for the purpose of erecting wharves and storehouses and, upon completing such construction into the lake, the adjoining landowners became vested with a limited title to such filled lands and the lakebed beneath such fill. The Plaintiffs construe such statutes as retaining the public

trust rights in such filled lands and that the title to the filled lands and the lakebed beneath remain subject to the doctrine of public trust.

The Plaintiffs further assert that as a result of the continuing applicability of the doctrine of public trust to the filled lands, the Plaintiff State of Vermont, as trustee, and Plaintiff City, pursuant to its asserted authority over the Burlington Harbor, each have the present duty to assure that the uses of such filled lands are consistent with the doctrine of public trust.

32. This Defendant has entered into an agreement with Defendants Alden and McLean which grants Defendants Alden and McLean the option to purchase portions of the Defendant property on the Burlington waterfront.

33. By reason of the varying interpretations of the above referenced Act of 1827 and Act of 1874 regarding the nature of title conveyed by such statutes, by reason of the Plaintiffs' assertions of the continued applicability of the doctrine of public trust to the lands filled and lakebed beneath, and by reason of the Plaintiffs assertions of other rights to the filled lands and lakebed beneath, there is a cloud on the title to all of the filled lands on the Burlington waterfront owned by this Defendant and there is uncertainty and insecurity with respect to this Defendant's rights, duties, status and legal relations in regard to all of the filled lands on the Burlington waterfront owned by this Defendant which impedes the ability to use, convey and/or develop all of this Defendant's lands on the Burlington waterfront.

WHEREFORE, in order to stabilize and clarify legal relations between Plaintiffs and Defendants, to remove

the cloud on Defendant's title, and to remove uncertainty and insecurity respecting this Defendant's rights, duties, and status in regard to the lands in which rights and interests are claimed by Plaintiffs, Defendant Central Vermont Railway, Inc., prays this Honorable Court issue, together and in the alternative as appropriate, the following relief:

Request for Relief 1.0 A Declaratory Judgment pursuant to 12 V.S.A. §4712 as follows:

1.1 That the Vermont General Assembly by means of Act of 1827, No. 38 and Acts of 1874, No. 85, as revised and amended, granted to Defendant CVR and its assigns, or to Defendant CVR's predecessors in title, a fee simple absolute title to those lands which have been created by Defendant CVR or CVR's predecessors in accordance with the terms of those statutes by filing in below the historic low water of Lake Champlain and the lakebed beneath such filled lands and that the General Assembly was legally or constitutionally competent to do so, and therefore that such conveyance is legally effective.

1.2. In the alternative, if the Court declares that any public trust interest exists and remains under such statutes, that the Court declare and decide:

A. That the public trust interest subjects Defendants Central Vermont Railway, Inc., fee simple title only to an easement in favor of the public for access to Lake Champlain for the traditional purposes of fishing and navigation; and/or

B. That Plaintiffs have no present interest by virtue of such public trust interest but that such public

trust interest is a future interest exercisable only upon Defendant Central Vermont Railway, Inc.'s transfer of the property to nonpublic uses.

Request for Relief 2.0 An order quieting title and decreeing Defendant's property free and clear of any right, title or interest of the Plaintiffs and removing the cloud upon Defendant's title to its lands on the Burlington waterfront.

Request for Relief 3.0 A permanent injunction restraining and enjoining Plaintiffs from asserting any right in or to the Defendant's property on the Burlington waterfront, including the so-called filled lands, including:

A. Rights in the nature of reversion, right of reentry, right of ejectment, or extraordinary relief in the nature of *scire facias* or *quo warranto*.

B. Rights to require that the filled lands be used in a manner consistent with the alleged public uses covenant of the public trust doctrine.

C. Any riparian rights of the City as owner of the easterly portions of the original Water Lots 47-70 and easterly portion of Lots north of Water Lot 70.

Request for Relief 4.0 Any and all additional relief which the court may deem just and proper under the circumstances.

DATED at Burlington, in the County of Chittenden this 15 day of July, 1986.

LANGROCK SPERRY PARKER
& WOOL

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Supreme Court, U.S.
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No. 89-1489

IN THE

Supreme Court of the United States

October Term, 1989

CENTRAL VERMONT RAILWAY, INC.,
Petitioner,

vs.

STATE OF VERMONT and
CITY OF BURLINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT.

REPLY TO BRIEF IN OPPOSITION

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* Reference is made, pursuant to Sup. Ct. R. 29.1, to the listing of parties made in the Petition. No Amendment is required.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE VERMONT SUPREME COURT.

REPLY TO BRIEF IN OPPOSITION

Petitioner, Central Vermont Railway, Inc. ("CVR"), submits this reply to the Joint Response of the State of Vermont and the City of Burlington, for the sole purpose of responding to the State's and City's argument that the federal issue raised in CVR's petition was not raised in the courts below. Petitioner has included in the

appendix additional materials from the record to further illustrate and substantiate the fact that the federal issue was indeed raised in both courts below.

The State's and City's claim—which is their primary argument in opposition to the Petition for Certiorari—that CVR did not properly raise the "taking" issue in either the Vermont Supreme Court or in the trial court is seriously misleading. CVR did raise the issue; both explicitly and implicitly, it was the foundation of all of CVR's arguments against the positions asserted by the State and City. Respondents knew the issue was being raised, and argued against it. In fact, in the Vermont Supreme Court, they stated that "CVR's demands for payment of compensation in 'damages' would easily amount to several hundred thousand dollars *per acre.*" (1a) (Emphasis in original.)

CVR's main arguments in the courts below were aimed primarily at establishing that CVR owns these filled lands in fee simple absolute. Respondents' arguments, in contrast, were primarily aimed at convincing the courts that CVR had some lesser interest or no interest at all. Thus, Respondents are correct that this case was not primarily viewed as a taking case by any of the parties or the courts below. But CVR did argue, as Respondents concede, *see Joint Response* at 6-7 & n.1, that the arguments urged by the State and City could not be upheld without running afoul of the requirement of just compensation. Respondents' claim that the issue was not raised is thus misleading and flatly wrong.

In CVR's Post-Trial Brief to the Superior Court, for example, CVR argued that the State could not "reenter" or "revoke" the grants to CVR and its predecessors because, at the very least, such grants became "vested upon exercise." (7a). CVR went on to

cite cases from various states for the proposition that wharfing rights, once exercised, established valuable private property rights that could not be taken back without compensation. *E.g.*, *Lewis v. City of Portland*, 35 P. 256, 263 (Or. 1893) ("These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor.") (quoted at 10a).

In the Vermont Supreme Court, CVR's opening brief was primarily aimed at establishing CVR's fee simple absolute title, and at establishing the error of the superior court in determining that the lands were held subject to a public trust servitude. It was only upon the City's and State's cross-appeal, in which the State and City renewed their argument that CVR's interest was a franchise or a fee subject to a condition, that the possibility of a taking arose. Accordingly, in CVR's reply brief, CVR argued to the Court that such a result would amount to a taking. (2a-5a) References to "taking" or the necessity of "just compensation" appear at least 11 times in the Reply Brief in response to various arguments by the State and City that CVR had less than a fee simple absolute. In the conclusion of CVR's Reply Brief, CVR explicitly requested that—should the Court agree with the State's arguments that CVR's interest was subject to revocation or forfeiture—the Court require that compensation be paid. (5a)

The Vermont Supreme Court, in effect, ignored CVR's arguments and avoided the taking issue under the guise of interpreting the 1827 Act. The Court did not need to reach the taking issue because it had already determined that there were no rights to be taken. That "interpretation" may be reviewed by this Court to ensure that it had a reasonable and substantial basis in

state law. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); *Fox River Co. v. Railroad Comm'n*, 274 U.S. 651 (1927).

The taking occurs in this case as a result of the Vermont Supreme Court's decision to "infer" an unexpressed "intent" on the part of Vermont's 1827 General Assembly to create a condition subsequent—without any basis in state law. Thus, according to the Vermont Court, if the property is not used forever for railroad, wharfing and storage purposes, the State of Vermont can re-enter and divest the railroad of its fee simple title. Such an unprecedented decision has far-reaching effects not only to the railroad's property, but to waterfront land ownership and a myriad of private property rights throught the State of Vermont.

For the reasons stated in CVR's petition, the Vermont court's determination was highly irregular, constituting an evasion of Petitioner's federally protected property rights, and Petitioner respectfully requests that its petition be granted.

Respectfully submitted,

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APPENDIX

Excerpts from
Combined Response Brief/Reply Brief
of the State of Vermont and
City of Burlington

Filed in the Vermont Supreme Court,
Dated 2 June 1988

[Page 41:]

VII.

IF APPELLEE HOLDS FILLED LANDS IN FEE SIMPLE SUBJECT TO THE PUBLIC TRUST DOCTRINE, IT DOES SO SUBJECT TO THE STATE'S SOVEREIGN AUTHORITY TO DECLARE, ESTABLISH, AND IMPROVE PUBLIC ACCESS EASEMENTS.

A. *The State as the Public Trustee has Sovereign Authority to Declare That Public Access is the Only Permitted Common and Public Use on Portions of Filled Lands, and CVR Has No Compensable Property Interest When that Authority is Exercised.*

CVR's demands that public access easements be obtained by exercising the power of eminent domain is filled with irony.

* * *

CVR's demands for payment of compensation in "damages" would easily amount to several hundred thousand dollars *per acre.*

[Page 43:]

CVR has no compensable property interest when the public's trustee exercises its sovereign powers over the trust in such a manner. *See, State v. City of Cleveland, supra.* The State may set out ample portions of the filled lands, no longer used for railroads, as public access and recreation areas.

Excerpts from
Appellee's [CVR's] Reply Brief

Filed in the Vermont Supreme Court,
Dated 12 May 1988

[Pages 2-5:]

* * *

II. THE GRANT TO CVR WAS OF FEE SIMPLE ABSOLUTE, TO THE EXTENT THE GRANT WAS A FRANCHISE, SUCH FRANCHISE VESTED UPON EXERCISE AND ITS RIGHTS CANNOT BE TAKEN WITHOUT COMPENSATION.

The grants under the 1827 and 1874 Acts conveyed fee simple absolute title. [CVR Brief §III.A.] The State asserts that the grants conferred by the 1827 and 1874 Acts were in the nature of a "franchise" of an indefinite duration, such that the railroad rights to the filled lands would terminate upon nonuse for railroad purposes or after a reasonable time elapsed. [State Brief 18-23.]

* * *

Even if the Legislature grants are considered "franchises," such characterization is irrelevant to the current status of title. The State notes that Connecticut has referenced similar wharfing rights as "franchises." [State Brief 19 n.3.] However, the majority view, including Connecticut, is that such franchises vest upon exercise and when vested are subject to constitutional protection, including the right of compensation if there is a taking. [CVR Brief §III.C.]

In other contexts, Vermont joins in that majority view:

> A franchise has the character of property or estate in which the holder has a vested right, and it is entitled to the same protection under constitutional guarantees as other property.

State v. Gibbs and Lynch, 82 Vt. 526 (1909).

The referenced "constitutional guarantees" include the right of "an equivalent in money" when the property is taken for use by the public. *Vermont Constitution*, Ch. 1, Art. 2. Appellants themselves have recognized this right to compensation specifically in regard to takings of the filled lands on several occasions. [Finding 13; PC 241].

* * *

III. TITLE AND POSSESSION TO FILLED LANDS CREATED UNDER STATUTORY OR COMMON LAW AUTHORITY ARE NOT SUBJECT TO REVOCATION OR FORFEITURE.

III. A. *Revocation Or Forfeiture Cannot Be Made Without Compensation.*

The State asserts that by virtue of the public trust doctrine, any legislative grant of submerged lands is revocable citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387 at 455-56, 459-60 (1892) and *National Audubon Society v. Superior Court*, 658 P.2d 709 at 723 (Cal. 1983). [State Brief 13.]

It is undisputed that the Vermont Legislature has the right to revoke a grant under the statute to the extent it was not yet exercised and, in fact, the actual grant of the right to "wharf out" under the 1827 Act was repealed and revoked effective in 1968. Acts of 1967, No. 308 (Adj. Sess.), Sec. 10. However, in this case, the grant was exercised by the railroad prior to revocation. [Finding 18; PC 232.]

Neither *Illinois Central* nor *National Audubon*, support the State's proposition that title and possession of submerged lands which have already been filled under authority of common law or legislative grants can be revoked and forfeited. The Court in *Illinois Central*

addressed a revocation of a grant of 1,000 acres covering the entire harbor of Chicago, which grant had *not yet been exercised.* The Court held that such right of revocation did not apply to grants in aid of navigation or for public purposes or which did not impair the public use and enjoyment of the remaining lands. *Illinois Central,* 146 U.S. at 452. Moreover, the Court held a revocation of a grant would require compensation for the cost of any improvements. 146 U.S. at 455.

In *National Audubon,* the Court did not hold that the grant was subject to revocation, but that title under grants which were not in aid of navigation or commerce was impressed with public trust rights. Moreover, the Court stated that any retaking of title to such lands required payment of compensation even if such retaking was in the exercise of public trust rights. *National Audubon* at 722-23. *See also State v. Superior Court of Placer County,* 625 P.2d 256, 261 (Cal. 1981). Further, the Superior Court in this case, citing *City of Berkeley* and *Illinois Central,* found that if the State were to reclaim the filled lands, any improvements could not be appropriated without compensation. [Finding 62; PC 246.]

[Page 17:]

* * *

V.C. *Easements For "Public Improvements" Over Filled Land May Not Be Taken Without Payment Of Just Compensation Unless For A Navigation Purpose.*

Some courts have recognized that filled lands are subject to certain public trust rights, including the federal navigation servitude, but those decisions do not extend such rights to include the acquisition, without just compensation of such filled lands for uses

unconnected with navigation. *See* e.g. *Clement v. Burns*, 43 N.H. 609, 614 (1862) (taking of filled lands for road not permitted without compensation); *State v. City of Cleveland*, 82 N.E.2d 709 (Ohio 1948) (construction of lakeside highway on filled lands not permitted without payment of compensation); *Lewis v. City of Portland*, 36 P. 256 (Or. 1893) (taking of filled lands for bridge abutment not permitted without payment of compensation), *United States v. 50 Foot Right of Way*, 337 F.2d 956 (3rd Cir. 1964) (taking of right of way for petroleum pipeline for "war effort" not in aid of navigation and therefore compensation must be paid).

* * *

[Pages 22-23:]

* * *

VI. CONCLUSION AND REQUESTS FOR RELIEF

* * *

CVR further requests that this Court hold that title to the filled lands is not subject to revocation or forfeiture unless there is a breach of an express or clearly implied condition of the grant and that CVR has not breached any such condition, therefore, no grounds exists for revocation or forfeiture of the grant. In the event the Court determines that grant is subject to revocation or forfeiture, CVR requests the Court to hold that compensation must be paid for all improvements made to the formerly submerged land upon such revocation or forfeiture.

* * *

Excerpts from
Trial Brief of Defendant Central
Vermont Railway, Inc.

Filed in the Chittenden Superior Court,
Dated 6 January 1987

[Page 33:]

Furthermore, even if the Court finds that the filled lands granted under a "franchise" the Plaintiffs must adequately compensate Defendant for the taking:

> "A franchise has the legal character of property or an estate in which the holder has a vested right and is entitled to the same protection under constitutional guarantees as other property." *State v. Gibbs and Lynch*, 82 Vt. 526 (1909).

Such constitutional protections include the right of "an equivalent in money" when the property is taken for use of the public. *Vermont Constitution*, Ch. 1, Art. 2. The Defendants' right to compensation for takings of the filled lands has been fully recognized by the Plaintiffs in the past. *See infra* pp. 16-18.

* * *

[Pages 38-39:]

Notwithstanding this position, Defendants vehemently disagree with Plaintiffs that the land uses and restrictions articulated in the zoning ordinance adopted by the City of Burlington in December 1986 are consistent with requirements of any public uses covenant or easement. Defendants believe that such zoning ordinance is not consistent with the dictates of the *Vermont Planning and Development Act*, 24 V.S.A. §4401 *et seq* under which shoreline zoning is permitted. Furthermore, the Defendant asserts that the ordinance adopted by the City of Burlington is merely an effort to take CVR's land without compensation in the event they are not successful in taking the land without compensation under this suit.

Excerpts from
Defendant Central Vermont Railway, Inc.'s
Post Trial Brief

Filed in the Chittenden Superior Court,
Dated 3 April 1987

[Pages 7-9:]

IF GRANTS OF 1827 AND 1874 ACTS WERE FRANCHSIES, SUCH HAVE BECOME VESTED

The Plaintiffs assert that there is a "majority rule" that "the General Assembly acting as the public's sovereign trustee may reenter, revoke or seek forfeiture of its grants and decide the next public use(s)". (*See* Plaintiffs' Post-Trial Brief at pp. 5-7). However, the holdings of the cases cited by Plaintiffs do not stand for such proposition; none address the issue of an implied right of revocation where there has been an express grant or attempted grant of the title to the submerged lands.

In fact, even if the grants are "franchises," the majority view is that such grants become vested upon exercise and when vested are subject to constitutional protection, including right of compensation if there is a taking:

> Where the reclamation and filling of the adjacent shore or submerged soil was expressly permitted by legislative enactment, or was authorized by a statute fixing a bulkhead, harbor, or dock line, or similar statute, or by a valid license or permit, or by local common law, it has usually been held or recognized that filled land created by a riparian or littoral proprietor belongs to him as a part of the upland, at least where the public rights with respect to navigation and commerce are not substantially impaired 91 A.L.R. 2d 857, 867.

For example, courts in the following states have held that the wharf rights are vested upon exercise:

> *Connecticut: State v. Knowles Lombard Co.*, 122 Conn. 263, 267 (1936): "It is obvious that if the riparian owner builds a wharf in the exercise of his franchise, to that extent the rights of the public to the use of the beach are extinguished. . . ."
>
> *New Hampshire Clement v. Burns*, 43 NH, 609, 614 (1822): ". . . That part of the shore having been reclaimed by the erection of the wharf, the new land thus formed must be regarded, so far as the proprietor is concerned, as private property and subject to the right of eminent domain, like the upland to which it is attached."
>
> (Clement continues to be cited with approval. *See Donaghey v. Croteau*, 401 A.2d 1081 (1979).)
>
> *Rhode Island: Allen v. Allen*, 32 A. 166 (RI 1895): ". . . The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. . . ."
>
> *New York: U.S. v. 25.4 Acres*, 52 F.Supp. 75, 83 (1943): ". . . '[W]here the grant or patent merely recites that it is for the purposes of commerce, the patentees and grantees, despite this recital, take unrestricted titles, subject, of course, to such regulations as the State in its sovereign capacity may make for the general regulation of commerce and navigation. . . .'
>
> Even though there was no conveyance in terms of the land under water, but a grant only of the right to build bulkheads and docks and to fill in, the rule is the same. . . ." *citing Matter of City of New York*, 246 N.Y.1, 157 N.E. 911, 917 (1927)."

See also: Beard's Erie Basin, Inc. v. New York, 142 F.2d 487, 491 (1949): "... These statutes ... made it lawful for certain water-front owners in the area involved to construct docks and fill in land under water in front of their property between the shore and a designated line. ...

....

... [Upon filling Plaintiff], therefore, holds not only the upland and lands under water in fee simple, but also the filled lands . ..."

See also: First Construction Co. v. State, 116 N.E. 1020, 1025-6 (N.Y. 1917): "... [T]he acts prior to the one of 1884 did not by their terms, purport to grant and convey lands under water. They simply granted a privilege of filling in or erecting improvements.... [I]t was implied that when the privilege had been exercised and the lands filled in, the beneficiary of the grant would become the owner thereof. ...

....

... [A]n act granting the right to fill in lands under water, and thereby acquire title to same, gives an inchoate vested interest in the lands described which is a property right and of which unless forfeited or lost in some way, the grantee cannot be deprived without compensation .... [T]he preponderance of authority in other jurisdictions is in favor of this view ...."

Maryland: See Harbor Island Marine, Inc., supra at 1-2.

New Jersey: River Development Corp. v. Liberty Corporation, 144 A.2d 180 (N.J. 1968): "... [T]he local common law or local custom to improve the shore and by reclamation or improvement to obtain title in fee simple, was a mere license revocable at the will of the Legislature. It became irrevocable

only when the license had been executed and the riparian owner had effected the reclamation or improvement. . . . (p. 189)

. . . .

'. . . [I]n virtue of a local custom, long prevalent in this State, and now having the force of established law, the adjacency of his land to the stream invests him with a license to fill in and wharf out, on the public domain, to such an extent as does not interfere with the public rights of fishing and navigation, and this license, when executed, becomes irrevocably, and confers on the riparian owner a good and indefeasible title to the land thus reclaimed.' " (p. 198)

Florida: Hayes v. Bowman, Fla., 91 So.2d 795, 800 (1957): ". . . It should be noted . . . that no title is acquired *until* such submerged lands are actually filled in or permanently improved." (Emphasis added)

Oregon: Lewis v. City of Portland, 35 P. 256, 263 (Ore. 1893): ". . . [T]he riparian owners who have taken advantage of the permission or privilege to build wharves . . . have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. . . . Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois*, in conflict with this result."

* * *

Excerpts from
Defendant Central Vermont Railway, Inc.'s
Proposed Findings of Fact and
Conclusions of Law

Filed in the Chittenden Superior Court,
Dated 27 March 1987

[page 26:]

* * *

ALTERNATIVE CONCLUSION—FRANCHISE IS "VESTED RIGHT"

120. "A franchise has the legal character of property or an estate in which the holder has a vested right and is entitled to the same protection under constitutional guarantees as other property." *State v. Gibbs and Lynch*, 82 Vt. 526 (1909).

121. Such constitutional protection includes the right of "an equivalent in money" when the property is taken for use of the public. *Vermont Constitution*, Ch. 1, Art. 2.

122. The Defendants' right to compensation for takings of the filled lands has been fully recognized by the Plaintiffs in the past. *See* Exhibits 214-223.

123. The grants under the 1827 and 1874 Acts were not of "indefinite duration." The legislature specifically provided that the duration of such franchise is "forever."

124. CVR has a vested right in the filled lands. Therefore, if the City or State wishes to obtain such lands, CVR must be compensated fully for such property.

* * *